90-180

Supreme Court, U.S.
FILED
JUN 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IRWIN COOPER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, THE DEPARTMENT OF VETERANS AFFAIRS and EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether veterans, denied the right to an attorney and judicial review, may enter the Courts by challenging the constitutionality of the VA's claim adjudication system, seeking redress of their just grievances - and if so, under what circumstances ?

2. Whether this Court will resolve the acknowledged conflict between the 7th Circuit, as evidenced by Marozsan v U.S. (en banc),(852 F. 2d 1489, 1988) and the 2nd Circuit (instant case) over whether the VA's unpublished policies, practices and procedures are subject to judicial review, as in Marozsan - and as they were in Bowen vs The City of New York, (SSA) - or not, as in the instant case ?

3. Whether the due process protections afforded welfare recipients, as defined in Goldberg v Kelly, 397 U.S. 254 (1970), apply to veterans recognizing that approximately 20% of all veterans claims are based upon need ? If so, under what circumstances ?

4. Is 38 U.S.C. 211 (a) constitutional considering that the Johnson v Robison Court, 415 U.S. 361 (1974) premised its opinion upon flagrant V.A. misrepresentations to the Congress and said Court, as shown in this writ of certiorari ?

5. Whether dismissal by the Second Circuit, under a rule 12 (b)(6) motion, is appropriate - when it failed to address petitioners equal protection allegations, without subjecting same to litigation ?

6. Whether dismissal by the Second Circuit under a rule 12 (b)(6) motion is appropriate in view of the substantial constitutional questions raised, as alleged in the complaint, without subjecting said allegations to the crucible of litigation prior to the dismissal thereof ?

7. Whether the letter, spirit and intent re the law of recusal(28 U.S.C., 455) has been violated, pursuant to a District Court Judge's failure to recuse himself, prior to rendering a decision, after acknowledging in open Court that he was a " potential litigant " under similar circumstances, as those alleged by petitioner, with a financial interest no matter how small, and consequently - becoming a material witness to the VA's " sub rosa " policies, and procedures ?

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OPINIONS BELOW

1. Order upon Petition for Rehearing and Suggestion for Rehearing en banc re the U.S. Court of Appeals for the Second Circuit denying plaintiff's petition for rehearing appears at appendix : A-1-3

2. Summary Order re the U.S. Circuit Court of Appeals for the Second Circuit appears at Appendix: A-4-8.

3. U.S.District Court's Opinion for the Southern District of New York appears at Appendix: A - 9-28.

note: Judicial cognizance must be taken of the Second Circuit Court's order that none of the aforementioned opinions are to be published in the Federal Reporter nor cited or other wise relied upon in unrelated cases before any court.

JURISDICTION

The petition for a rehearing was denied on February 28, 1990. The summary order for the Second Circuit Court of Appeals was entered on January 12, 1990. Prior thereto a memorandum and order was entered by the United States District Court for the Southern District of New York on June 22, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

note: The United States Supreme Court granted a 30 day extension pursuant to the filing of this writ of certiorari.

I. Statement of the Case

A) Nature of Case

This action arises under the Constitution challenging the V.A.'s budgetary driven " quota system " of dispensing justice in the adjudication of disability claims and alleges that said Agency employs 28 unfair practices and procedures [1] , the totality of which violates petitioner's and other veterans' First and Fifth amendments rights to include the right of counsel, due process and equal protection.

Petitioner submits that unfair V.A. practices and procedures are clandestinely structured to cause the petitioner and other veterans to abandon valid claims in utter confusion, frustration and despair or failing in that objective, to hold hearings and render implausible decisions which make a mockery of impartiality and

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[1]. Appendix: A 35 - 42

the due process protections required under the Constitution, relevant statutes and case law.

Moreover, petitioner submits that the lack of judicial review and the meaningful right to retain an attorney fosters a climate of unconstitutionality resulting in impermissive V.A. practices and procedures, evidencing flagrant bureaucratic abuse, which clearly demonstrate that the V.A. has run amok with unbridaled power. [2]

Some specific VA policies, practices and procedures complained of by the petitioner, which in their totality are unlawful, as clandestinely implemented, are as follows:

1) **Budgetary** " not fact driven " quota decisions employed when dispensing justice (Appendix:C-50, C84,88,89;B-4 sect4004(c)

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[2]. Lord Acton: " Power corrupts, absolute power corrupts absolutely."

2) Lack of an independent decisionmaker. (see Appendix: C- 51)

3) Questionable medical evaluations performed by intimidated VA physicians, some at the rate of one per minute; also refusal to sanction independent medical opinions. (Append: C-21;C-56,57; C-83,84)

4) Treating physician or expert medical opinions rendered in behalf of veterans are routinely trashed by the VA's general practitioners. (See Appendix: C-53)

5) Judgments are often made absent the in-service or V.A. treatment records and then veterans are advised, as petitioner was : " Service medical records do not indicate treatment for the claimed injury ". (see Appendix: C-81)

6) Hearings are often covertly denied veterans. (Appendix: C-58,59; C-60-65)

7) Veterans lack subpoena or cross examination power needed to compel the VA to confront the facts or its errors.

8) Different treatment is accorded similiarly situated veterans, by the VA, depending upon but not limited to the congressional district or state of residence, who represented them, and the abject failure of VA to codify its decisions which contribute to a lack of uniformity.App:C1-4;5-8;42,43;79-84;94-97

9) BVA decisions are subject to productivity quotas requiring decision makers to render between 40-80 decisions per week. The emphasis is placed upon denying claims, since it's easier to deny than approve claims. App:C-13-15;C-106,107

10) To meet unrealistic productivity quotas of 40-80 per week, the adjudicators with the full knowledge and consent of their superiors, resort to " courtesy decisions ", or signing off on claims never read, and in the process thereof, denying veterans the full due process consideration they are entitled to under

38 U.S.C. (See Appendix: C-9-15;C-104-110)

11) BVA allowance rates, thought for over 20 years to be at 13 %, are considerably less, perhaps within a 4-6 % range. C-9,10

12. The VA engages in the premature denial of claims. (See appendix: C-18-20)

13. Lack of due process as evidenced by: (Appendix: C-33-35 (par 14,15,17); C-36-39 (par. 18,19,22-24);C-70-75; C-76-84; C-104-110; C-111-115; C-116-118)

14. The VA practices intimidation in order to obtain the goals demanded by the Office of Management and Budget. C-40-43;C 44-46; C51;C68,69;C116-118;B-3,38 U.S.C. 3402(a)2

15. This Court in Johnson v Robison relied upon the VA's assurance that it had achieved a degree of uniformity which the Courts could not duplicate, and consequently, premised a portion of its rationale when upholding the constitutionality of 38 USC 211(a), on that false representation. Appendix: C-5-10;C-79-84; C 111-115

16. This Court in Johnson v Robison further premised its rationale for upholding the constitutionality of 211 (a) on the VA's assurances that it could adjudicate technical and complex veterans claims better than the Courts. That too was false. (See Appendix C-10-12;C-21; C-32-39 (par 15,17,18,19,22,23,24); C-47-55; C-82-84; C-107,108; C-118).

In sum, the VA can do whatever it pleases, whenever it pleases, unhindered by judicial review, or the procedural safeguards imposed upon other agencies, in accordance with, the Administrative Procedures Act (APA).

Further, absent meaningful Congressional oversight (all too prevalent these days), absent the interest of the press, absent the active participation of the legal profession due to the chill of the $ 10 attorney fee limitation, absent the protective umbrella of the (NVSO's), who

have betrayed their own members'interests on the alter of government largesse - is it any wonder, that the VA has run amok with unbridaled power ?

(see Appendix: C- 22-26; 27-31)

Additionally, judicial cognizance must be taken of what prompted the SSA bureaucrats in Bowen v The City of New York to employ the unlawful practices this Court so eloquently ruled against in Bowen. Said unlawful practices originated from the VA bureaucrats success in depriving veterans surreptitiously of their entitlements by rendering implausible decisions, contrary to the facts, in conformance with the requirements of the Office of Management and Budget.

Likewise, judicial cognizance must be taken of the several protective factors prevalent in Bowen which are missing at the VA. Importantly, SSA recipients have a large block of attorneys banded together

in an organization called NOSSCR, whose members routinely practice before the SSA; no such organization exists re veterans representation. The SSA is required to get their decisions thru ALJ's and State Agencies; not so at the VA, who hold all the cards and its adjudicatory personnel hostage to advancement, demotions, bonuses and unrealistic productivity goals. Also, social security recipients have judicial review, expressly denied veterans.

The foregoing explains why the unlawful practices of the SSA were discovered within a relatively short time whereas those pertaining to veterans remain to be disclosed 57 years later, and only if, this Court will allow litigation of the allegations contained in the "Complaint".

It also explains why, petitioner has more evidence before discovery than Bowen had after discovery. Moreover, there are literally thousands of conscience stricken

VA employees and National Veterans Service Officers ready to spill their guts, if only, someone will ask them a question. So far no one's asked.

B. Review Requested of the Supreme Court

1. The petitioner's complaint, and the allegations contained therein, not heretofore litigated in their totality, before any court - was dismissed in its entirety pursuant to a 12 (b) (6) motion. Accordingly, petitioner now seeks review of the 2nd Circuit Court of Appeals affirmance of the Southern District Court's order dismissing the instant action.

Under this Court's prior holdings, other Circuit Court of Appeals holdings, and even some of its own prior District and Circuit Court holdings, petitioner submits that the Southern District and the 2nd Circuit Court had no factual or legal basis to dismiss instant action considering that " district courts have

jurisdiction to entertain constitutional attacks on the operation of the VA claims system " [3]; particularly, since the petitioner's allegations were never subjected to the crucible of litigation.

Moreover, petitioner submits that the substantial allegations of a VA budgetary driven "quota " system, incorporating clandestine " sub rosa " policies, practices and procedures devised with the express purpose of denying claims are likewise subject to litigation, not dismissal - when all of petitioner's allegations are deemed true, and consequently, should not be subject to dismissal under a rule 12 (b) (6) motion.

2. **Further**, this Court is requested to review dismissal where both the District and 2nd Circuit Courts failed to

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[3]. Walters v Nars, 473 U.S. 305, 310 note 3, (1985) quoting Johnson v Robison, 415 U.S. 361 (1974).

address petitioner's substantial equal protection allegations contained in the complaint, without a passing reference or discussion thereof. And whether, under the circumstances, this Court sanctions such injudicious treatment ?

Petitioner's equal protection allegations include similarly situated veterans being treated differently by the VA on the basis of residence, type of representation and a failure to codify claims decisions; none of which were addressed in the lower Court decisions.

3. **Likewise,** this Court is requested to review whether the apparent dismissal of petitioners first amendment allegation of unconstitutionality, prior to litigation thereof, was appropriate considering that the attorney ten dollar fee limitation was held to be constitutional once by this Court,and consequently, must forever remain so, in the 2nd Circuit, irrespect-

ive of important new evidence. Append:A-21

The 2nd Circuit gave the same interpretation to 211 (a), saying that since it was declared constitutional under Johnson v Robison that it is not subject to litigation irrespective of important new evidence. (Appendix: A-21)

4. Additionally, this Court is requested to review the District Court's failure to recuse itself (affirmed by the Circuit Court of Appeals) pursuant to petitioner's motion under 28 U.S.C. 455, requesting the judge's recusal after acknowledging in open court, that he too was a " potential litigant ", having been victimized himself, by some of the same procedures, as those alleged, in the petitioner's complaint. (App: A-29-34)

note: The District Court Judge although never denying that he was a potential litigant, simply ignored his own statement

5. Review is requested by this Court of

petitioners request for a directed verdict declaring 211 (a) unconstitutional, in view of the VA's flagrant misrepresentations to this Court, in Johnson v Robison, which induced said Court to uphold the constitutionality of 211 (a).

The VA made representations to the Congress upon which this Court subsequently relied which the VA knew or should have known were false, such as:

a) The VA knew that claims decisions were not uniformly made since such decisions were never codified. Further, the VA knew it couldn't achieve uniformity in the same room, on the same floor or in the same BVA building, much less throughout the country. BVA Chairman Kenneth Eaton recently testified to that fact before the Congress. [4]

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[4]. Kenneth Eaton Testimony,App C-5-10

b) **The VA knew** that any technical expertise it may have had in deciding technical and complex medical cases is held hostage to a budgetary driven quota system as evidenced by hundreds of thousands of complex medical decisions being made by unqualified, intimidated doctors at rate of one per minute, contrary to the medical facts in conformance with its budgetary driven quota system. (Appendix: C-21;C-51,etc,)

c) **The VA expressed** concern that veterans' should not burden the Courts and the Veterans' Administration with expensive and time comsuming litigation. Disengeniously, however, the VA never told the Court that they routinely bring hundreds of thousands of veterans into Court on the basis of alleged overpayments, and in the process thereof, veterans are not permitted to plead a defense or to return the favor.

Apparently, the Courts are overcrowded only when veterans wish to enter, not when the VA wishes to enter. (App. C-66-69)

Further, the overcrowding issue could easily be resolved if the Courts adopted the VA's productivity standards of requiring 40 to 80 decisions per week. Justice might suffer, but overcrowding would be a memory. (Appendix: C-106,107)

Actually, the VA never genuinely considered the Court's interests in avoiding overcrowding, just as it never truly considered the veterans' interests when deploring having to share their awards with attorneys, if the ten dollar fee limitation were removed. The VA's reason is the same on both counts - namely, to keep its abuse of veterans a secret from the American people. What better way to accomplish this than to keep both the attorneys and the Courts out of the VA's business.

d) This Court's own rationale regarding the nation's compelling interest in raising an army, is premised upon a lie when one considers the kind of an army which could be raised, once the American people learn " the awful truth " re the treatment awaiting their youngsters, should they be injured in the defense of liberty and the constitution.

Is there any rational basis to deny American veterans the protection of the constitution they fought to preserve for everyone else, only to be denied it themselves, in the furtherance of bureaucratic comfort and convenience ?

Can bureaucrats, or anyone else for that matter, be trusted with plenary powers which incorporate the right to be the investigative arm, attorney for both sides, judge, jury, Court of Appeals, regulation and policy giver, all without judicial review, without the presence of

attorneys protecting veterans'rights,with -out being subject to the APA and without a single administrative safeguard ?

Do veterans have any remedy under present law ? Not in the Southern District which apparently has never permitted a case to go forward challeng-ing the constitutionality of 211 (a).

What is the price of admission to the Southern District Court ? Petitioner does not know, while the instant decision sheds no light on the price of admission to said Court, assuming there is any.

Meanwhile, based upon information and belief re LEXIS, 122,000 veterans have been thrown out of District Courts pursuant to 211 (a). That's quite a lot of dissatisfaction with 38 U.S.C., a law, whose specific intent was to assist veterans in returning to civilian life with as little trauma and inconvenience as possible. Since veterans don't have the

financial resources to bring suit, the petitioner suspects that the misery index of 122,000 would project considerably higher, if all veterans had the necessary resources to commence suit.

Today, after twenty, thirty or more years, tens of thousands of veterans continue to walk the corridors of time, unable to get a rational explanation as to why their claims were turned down.

Accordingly, there is no basis or rationale for upholding the constitutionnality of 211 (a). Petitioner knows that 211 (a) stands on a tenuous thread of legitimacy and that this Court was a most reluctant participant in upholding the constitutionality of 211 (a) - doing so, solely out of deference to Congress.

If there was a basis for constitutionality before, there is none now, as the bureaucrats by their actions (which could have been anticipated) have made

a mockery of fairness and justice, and shredded any pretense of impartiality when deciding claims. The " Framers " would not have been surprised over the wide- spread system of abuse inflicted upon helpless veterans - especially, when our carefully nurtured separation of powers concept, is breached by laws, such as 211 (a). What should we have expected ? Exactly, what we got !

By way of analogy, the Bowen case is but a pale imitation of the abuse bureaucrats inflict upon veterans. After all the VA has had 57 years to perfect its much admired system of bureaucratic injustice.

The VA characterizes its system as " informal and nonadversarial" endeavoring to place some cloak of respectability around the process. Accordingly, this Court should be advised that VA procedures are formal and nonconfrontational, not informal nor nonadversarial. The name is

" deceit" and the game is " deception ".

In order to maintain the integrity of the " quota system " veterans claims are routinely thrown out for the most trivial transgressions, without prior warning or notice, on what is euphemistically called "record purpose disallowances". (App: C-17-19) Moreover, veterans (without attorneys) failing to assert proper and/or specific causes of action are likewise removed without prior warning or notice from this alleged nonadversarial system of injustice.

Consequently, most veterans do not perceive the system as nonadversarial or fair, considering it to be a dirty trick, " plague infested " system of injustice.

C. Statutory and Regulatory Framework

1. Title 38 or 38 U.S.C. was enacted by a grateful nation, in recognition of the sacrifices made in the defense of

liberty by this petitioner and other veterans in order to assist in their return to civilan life, and to compensate them, in so far as possible, for service related injuries and disabilities.

2. **So certain** was Congress that this petitioner and other veterans would be treated fairly that it denied them, for all intents and purposes, the right to an attorney re 38 U.S.C. 3404 (c - 2) and the right of judicial review re 38 U.S.C. 211 (a) even where VA decisions were arbitrary and capricious.

3. **Recognizing however**, that the VA would be insulated from the normal constraints of checks and balances, Congress mandated that the VA treat veterans' interests equally with those of the government and that the VA assist veterans in the development of their claims, under 38 C.F.R. 3.103; also, that veterans be granted the benefit of

reasonable doubt, under 38 CFR 3.102.

4. Further, Congress entrusted the major NVSO's, which maintain offices in every VA installation with the fidiciary duty of safeguarding veterans interests by representing and protecting them against possible excesses by the VA.

5. Inexplicably, Congress enacted legislation under 38 U.S.C. 3402 (a)(2) which permitted the VA Administrator to furnish free space and office facilities to the NVSO's, at his sole discretion. As a direct consequence thereof, the alleged " watchdog " NVSO's were turned into " lapdogs ", silenced and held hostage, blackmailed into acquiescing, no matter the circumstances, under a mountain of " free " services aggregating

millions of dollars. [5]

38 U.S.C. 3402 (a)(2) created an inherent conflict of interest between the veterans service officers and their clients, which has never been disclosed to veterans represented by the NVSO's.

6. To complete the betrayal of veterans' interests, legislation was enacted which exempted the VA from having to comply with the APA .

7. Under the foregoing statutory circumstances, veterans are left " barefoot and pregnant " without the protection of the Courts, the NVSO's, the Congress, the American Bar Association, the ACLU, the Press; in short, the entire

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[5]. Sen Alan Cranston questioned the VFW as to whether they were intimidated by the possible loss of free services if judicial review legislation were passed, as threatened by the VA's Gail Gompf letter, June 5, 1986. Appendix: C-44-46

Answer: " Yes " by James N. Magill, VFW National Legislative Director.

body politic has been kept in ignorance re the sad state of veteran affairs.

Most importantly, veterans are powerless to help themselves, fragmented and bereft of national leadership, as they are- there is no place for them to turn for assistance. Unless light, the great disenfectant, is focused upon the VA in the form of judicial review, nothing will change.

One brief look at the number of amicus curie briefs entered in the Bowen matter should convince this Court of the vast sponsorship enjoyed by social security litigants, and the absence of any, in behalf of veterans in this action.

The $10 attorney fee limitation is primarily responsible for petitioner's failure to attract legal counsel, and for casting such a chill upon the legal profession - and why, this matter has to be pro se, although no fee limitation applies in this instance, while the

petitioner can pay a reasonable fee.

Petitioner sought competent counsel for over a month to no avail. Our original counsel lacked the necessary Supreme Court qualifications - and consequently, petitioner elected to go it pro se, aided by Veterans Due Process.[6]

D. Original Jurisdiction

Original jurisdiction of the District Court, was invoked pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1361.

E. Remedies Requested in the Complaint

Petitioner, in accordance with the complaint, sought the following remedies:

1) Petitioner requested that 38 U.S.C. section 211 (a) denying veterans judicial review of V.A. decisions, irrespective of how arbitrary or capricious, be declared

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[6]. Veterans Due Process, a national " grass roots " civil rights advocate organization, with its principal offices located in Portland, Oregon and New York City, New York.

unconstitutional on the basis of substantial new evidence not available to the Johnson v Robison Court, when it held 38 U.S.C. section 211 (a) constitutional.

2) Petitioner also requested that 38 U.S.C., section 3404 (c) (2), the attorney $ 10 fee limitation be declared unconstitutional. Said law denied and still denies petitioner counsel of his own choosing and the right to be meaningfully heard violative of the 1st Amendment.

Further, the ten dollar fee limitation creates an inherent conflict of interest, requiring veterans to employ the NVSO's (the only representation available) whose primary financial support is derived from the government - and whose motives are questionable at best.

3) Additionally, relief is requested, from the penalties imposed under 38 U.S.C. section 3405 (2) for the acceptance by attorneys of fees exceeding $ 10,

requiring their incarceration for a period of two years, at hard labor and fines.

Such penalties are deemed violative of the cruel and unusual punishment clause contained in the 8th Amendment.

4) Moreover, in the absence of constitutional relief pursuant to 38 U.S.C. 211 (a), the petitioner requests that the Court order the V.A.'s compliance with 38 CFR 3.103 which requires the Agency's assistance in the development of veterans' claims, mandating equal treatment of veterans' interests with those of the government; and 38 CFR 3.102 requiring that veterans' claims be accorded the benefit of reasonable doubt.

5) If none of the above requests for relief are granted, the petitioner asks for a remand of his claim to the V.A., accompanied by a Special Master, to insure compliance with Due Process, the letter, spirit and intent of the 38 U.S.C

Statutes, 38 CFR Regulations and the Constitutional safeguards incorporated in the Bill of Rights.

Some relief is essential in order to free injured veterans from the tyranny of bureaucratic abuse.

F. Relief Requested Is Not Moot, Despite Enactment of New Law

The District Court at appendix A-11, n 1, in agreement with the defendants, have acknowledged that the petitioner's constitutional claim and standing to pursue relief has not been rendered moot by the passage of Public Law 100-687, because it does not have retroactive effect.

Moreover, said law excludes the overwhelming majority of veterans, assuming any beneficial remedies were contained therein, in the first place.

III Argument

The decision to dismiss instant action by the Southern District, as affirmed in

its entirety by a 2nd Circuit Court of Appeals panel, under a 12 (b) (6) motion was predicated upon assumptions having no basis in fact, in derogation of statutory and case law - clearly at variance with the allegations contained in the petitioner's complaint and all reason which may logically be derived therefrom.

In sum, the judgments and/or orders mandating dismissal of this case, which can impact the lives of 27 million veterans and 53 million of their dependents, in such a cavalier manner, is at once a travesty and a blatant miscarriage of justice.

The Southern District held and the Second Circuit affirmed substantially for the well articulated reasons given by Judge Patterson, that " Plaintiff, a veteran , has brought this action challenging decisions of December 14, 1979 and June 25, 1981 of the Board of Veterans Appeals (the " BVA ")..." (Append: A-10)

Based upon that statement alone, the issue was irreparably prejudiced in the Courts' mind, and as a consequence thereof, sent petitioner's action down a slippery slope from which he has not so far recovered. In fact, the Courts' statement is completely false, clearly contrary to the facts and allegations contained in the " Complaint ".

Accordingly, petitioner brought the instant action, challenging the V.A.'s policies, practices and procedures,not its decisions, however flawed, requesting that laws denying veterans judicial review and attorneys, be declared unconstitutional, inter alia, premised upon new evidence, not heretofore, presented to any court.

Re 12 (b) (6)

The dismissal of the instant action pursuant to a rule 12 (b)(6) motion in the 2nd Circuit Court panel's own words :

" Plaintiff submitted a 52 page

memorandum which, despite its great length, failed to specify any particular rule or procedure employed by the BVA in denying plaintiff retroactive benefits to 1946 which plaintiff found unconstitutional. [7] Further, though plaintiff's memorandum and his complaint allege that the VA's process is inadequate when viewed in its entirety, he failed to show how that process injured him [8] in the denial of

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[7]. Petitioner never said that any particular VA rule or regulation was unconstitutional. Petitioner did assert, however, that the VA's " unpublished " budgetary driven quota system of claims adjudication accompanied by 28 unfair practices and procedures served to deny petitioner and other veterans a fair and impartial hearing, which he submits is unconstitutional.

The lower Courts are challenged to specify where petitioner alleged that " published " VA rules or regulations were unconstitutional. No such evidence exists.

[8]. The petitioner was injured by his failure to receive a fair and impartial hearing, to include implausible decisions, rendered in conformance with a budgetary driven quota system, by intimidated VA employees, utilizing (unpublished) unconstitutional practices and procedures alien to a democratic form of government. If there's no harm there, then the constitution has surely been rendered void where prohibited by law.

> retroactive benefits by the BVA in its 1981 decision. The district court therefore dismissed plaintiff's complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b) (6). "(emphasis added)
> " We affirm substantially for the well articulated reasons given by Judge Patterson in his written opinion dated June 22, 1989. "

note: No reference was made to petitioner's equal protection allegations. Did said allegations disappear or were they simply submerged under Judge Patterson's " well articulated reasons " ?

The petitioner on appeal to the 2nd Circuit cited 13 reversible errors in the facts, reasoning, statutory and case law, only one of which was addressed - and that, pertained to the recusal issue. **Inexplicably,** neither lower Court denied or addressed Judge Patterson's statement that he was a "potential litigant " having been victimized by the VA under some of the same procedures, as those alleged by the petitioner.

What does failure to state a claim upon which relief can granted mean under 12 (b) (6) ? According to Black 's Law Dictionary (Fifth Edition):

> " Failure of the plaintiff to allege enough facts in the complaint. Even if the plaintiff proved all of the facts alleged in the complaint, the facts would not establish a cause of action entitling the plaintiff to recover against the defendant. "

Under another definition gleaned from Moore's Federal Practice rules, defenses and objections re 12 (b) (6) :

> " A motion to disimiss under 12 (b) (6) performs the same function as the old general demurrer, in that it admits the well-pleaded material allegations of the complaint, (citations omitted) but denies their legal sufficiency. Consequently, the motion will not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of his claim. "
> (emphasis added)

Assuming the foregoing correctly states the criteria for dismissal under 12 (b) (6) - although recent Supreme Court holdings may have slightly revised the

criteria for granting dismissal under 12 (b) (6) motions. However, under no circumstances can this action be dismissed under 12 (b) (6) when considering that the petitioner is alleging the rape and murder of the constitution, as it relates to himself and other veterans. Moreover, the petitioner has more evidence before discovery than Bowen did after discovery. Under the circumstances, he should at least have the opportunity to litigate the issues pursuant to a " budgetary (not fact) driven " system of claims adjudication fostered under the attorney and judicial review preclusion clauses.

The V.A's Unconstitutional Claim System: how it harmed petitioner, and how it relates nationally to a climate of unconstitutionality.

1) **Implausibility of decisions** rendered by intimidated VA personnel in conformance

with a budgetary " not fact driven " quota system of dispensing justice.

a) Re petitioner: After allowing petitioner's claim, wrongfully denied for over thirty years, the BVA attributed their decision reversal to " advances in medicine " which absolved the VA from having to pay retroactive benefits under its clear and unmistakeable error rule, 38 CFR 3.105. Said regulation requires the agency to pay retroactive benefits when a clear and unmistakeable error has been made. Petitioner alleged 15 such errors.

When the VA was challenged to provide one single medical advance which had a material bearing on their decision to allow petitioner's claim, they either could not or refused to do so.

The BVA also claimed that new facts were introduced by the petitioner which caused them to alter their prior decision, but could not name one fact, which was not

in their files from the inception.The only thing new, was the appearance of the veter-an armed with the facts of the case, pursuant to the Freedom of Information Act.

b) Nationally: Dr. Alcide Pellerin

The 1977 Senate testimony given by Dr. Pellerin, employed by both the BVA and VA for eight years, and consequently - involved in thousands of decisions, clearly demonstrates the moral and legal bankruptcy of the VA's claims adjudication system.

What follows is a summary of his conscience stricken testimony:

* **The VA doesn't pay** substantial retroactive benefits, no matter the evidence. (Just as petitioner alleged)

* **He was coerced** many times, by the BVA Chairman, as were other Board members, under duress to render decisions contrary to the facts and his professional opinion.

note: petitioner in one of his letters to BVA Chairman, Eaton contended that all

of his Board members must have been drunk or worse to have unanimously reached their implausible conclusion)

* **Board Certified** specialists' opinions from prestigious places such as Mayo, Lahey and Georgetown Medical are routinely trashed by the VA. (same as petitioner's world famous orthopedic surgeon)

* **Begged forgiveness** of one veteran called Frank whom he robbed of $40,000 at the BVA Chairman's orders.

* **Veterans** will never get justice in the VA's kangaroo court until they are accorded judicial review.

See Complete testimony: (App C- 47-55)

note: Retroactive payment to Frank would have broken the BVA Chairman 's budgetary bank and that couldn't be tolerated. How can justice prevail when the adjudicators have a secret agenda having nothing to do with fair and impartial decision making ?

c) Nationally: Tracey v Gleason, **Further evidence** that the VA doesn't pay substantial retroactive benefits, no matter the evidence or circumstances.

Tracy vs Gleason, 379 F 2d 469 (1967) was a case ultimately decided by the U.S. Circuit Court of Appeals for the District of Columbia. In this action, the veteran's estate sued for the retroactive payment of benefits which were alleged to have been wrongfully withheld for 12years.

It seems, the VA terminated benefits originally awarded Mr. George Tracy because he failed to return an income questionaire. At the time, Mr. Tracy was confined to a mental institution for approximately ten or more years. The VA knew he had no income from prior replies. Moreover, the VA had the hospital Acting Superintendent's letter advising of his mental condition, and lack of earnings.

The D.C. Circuit Court of Appeals said :

" In our opinion the complaint tells a story of arbitrary and capricious action on the part of the officials : a) the Administrator acted arbitrarily in the circumstances when he terminated the pension of Tracy because that unfortunate, totally disabled by insanity, had failed to return an income questionaire; (b) the Board of Veterans Appeals acted arbitrarily in affirming the termination after it had learned the facts; and (c) the Administrator had acted arbitrarily in failing to make payments for the full period of discontinuance after he had been told what he should have known before: that George Tracy was insane and was totally and permanently disabled in 1949 and continuously thereafter. "

d) National: Norman Johnson

A summary of Norman Johnson's, a former BVA employee, 1977 Senate testimony follows:

- **Learned** to shelve his notions of professional objectivity and procedural due process.
- **Learned** there was a covert quota system in effect.
- **Lack of uniformity** in decisions.
- **Case decisions** were haphazard, unfair and probably illegal.

* **To cover** the loss of records, the opinion would say " Service records do not indicate treatment for claimed injury. " (same thing happened to petitioner when the VA rendered a decision without the records)

* **Racial basis** often affected decisions.

* **On questions** of total disability, my section was tight. Where the facts were close, the decision always went against the veteran, although the statutes mandate a liberal interpretation.

* **He was compelled** by his supervisor to render opinions contrary to his professional judgment.

* **Veterans** will not get fair treatment unless they are accorded judicial review. See App C-76-84.

e) <u>National</u>: Donald H. Schwab, Director VFW, before HVAC of 1980

" Many service officer's are increasingly disappointed in the denial of cases which they believe have considerable merit. Also, they wonder why, over the past eight years, the percentage of cases allowed by the Board of Veterans Appeals has fluctuated only a little over 2 percent whether that body considered 25,000 cases in the year or more than 35,000 cases. The average allowances have been 12.8 percent of cases considered. In the last 4 fiscal years, the variance has been only two-tenths of 1 percent in that allowances in 1976,1977, and 1979 were 12.7 percent and in 1978, 12.5 percent, in 1980, 12.4 percent. " (emphasis added)(App C-85-93)

note: Richard E. O'Dell, VVA National Vice President testified (2/18/88) before the Ted Weiss Subcommittee on House Government Operations that he had secured information pursuant to a December 30,1987 Freedom of Information request advising :

" If in a four issue appeal, three issues are denied and one issue is allowed, the VACOLS record will regard the V.A. decision as an allowance. "

Mr. O' Dell further testified :

" Moreover, it is conservatively estimated that the typical appeal at the BVA contains three issues and if it is assumed that two of the three are disallowed, the annual allowance rate would decline two/thirds from approximately 13 percent to 4.3

percent." (See Appendix: C-9,10) Actually, nobody knows, what the allowance rates are. The BVA publishes an allowance rate of approximately 13 %, but obviously that's far too high based upon the information which Mr. O' Dell received, and considerably lower than anyone knew or believed.

f) National: Kenneth T. Blaylock, President, American Federation of Government Employees (AFGE)

before the HVAC, November, 1979 representing over 700,000 people with approximately 116,000 VA members.

Mr Blaylock testified:

> " It appears to us as though large numbers of veterans have not received the benefit of reasonable doubt on any consistent basis. The informality of the Veterans Administrations appeal procedure, combined with absence of precedence in the disposition of cases, leaves wide discretion for inconsistent and uncontrolled decision making by the regional offices. In the absence of court review, there is no effective institutional check on arbitrary or impermissable action. " (emphasis

added) (Appendix: C-70-75)

2. Petitioner bitterly complained of the implausible medical decisions which contradicted the medical facts and the professional opinion of his world famous orthopedic surgeon Dr. Sidney Gaynor by a V.A. general practitioner with no orthopedic speciality.

a) National: Dr Alcide Pellerin, BVA Doctor testifying:

> " In contrast, should the veteran submit an opinion from a board certified specialist, say from some institution like the Mayo or Lahey clinic, the Arthritis Foundation or the Georgetown Medical Center, that only serves to reopen his case, and is considered as trash by the VA." (emph added) App:C-53

b) National: Deep Throat Letter# 1
Introduced into HVAC Hearing of 6/24/86 by VDP.President Phil Cushman.

> " In order to operate at reduced staffing, many regional offices no longer employ full time doctors for the rating board. Instead a part-time doctor is borrowed from a local medical center one to two times a week to sign his name to the accumulated rating decisions. He may spend one minute or less on each decision" (emphasis added) (Appendix: C-21)

c) National: Congressional Budget Office

introduced the following evidence into the SVAC hearing of 1982 :

> " It was assumed, based upon a BVA estimate , that the rate at which cases are denied by the BVA will drop from its present level of 70 percent to about 60 percent with the use of independent medical opinions (as authorized by section 108) and precedent decisions." (emphasis added) (App:C-56,57)

Extrapolations from the above clearly evidence that BVA allowances would improve from 30 to 40 percent or an increase of 10 / 30 or one/ third or 33 percent, if independent medical opinions were allowed.

However, the Congressional Budget Office has been misled into believing that the allowance rate is 30 percent, when in fact, the offical BVA allowance rate is only 13 percent. Consequently a ten percent claims allowance improvement in BVA terms, would result in 10 / 13 or a 76 percent claims improvement.

In either event, it is clear that

denying veterans access to an independent medical opinion is a budgetary driven concept, having nothing whatsoever to do with an informed decision or justice.

3) Petitioner: Re Hearings.

The petitioner, bitterly complained that he never got a fair hearing, that the results were prejudged or rigged or that the decisionmakers were lacking independence or drunk or worse.

a) National: Hearings - Richard O'Dell, Vice Pres., V.V.A.

Courtesy Sign -Offs (BVA)

" Another potential by product of production pressure (productivity quotas, 40-80 per week) and bonus incentives is particularly troubling. This is the practice by some Board members of signing off on a claim decision without even reviewing the file. The danger for veterans is one of being denied due process as prescribed by the laws governing the way appeals are supposed to be adjudicated. " (Appendix: C- 10,11)

An excerpt, from the May 11, 1987 informal grievance of 5 BVA members

complaining about the courtesy sign-off procedures employed at the BVA, further explains said procedures, as follows:

> "With regard to the same system of courtesies, any section member can give an in house courtesy signature, thereby accomplishing the same result as obtaining a 'courtesy' signature outside the section. All that is required are cooperative Board Members who are mainly motivated by monetary awards rather than concern for the proper adjudication of claims." (C-12)

> " We need not identify those sections which routinely engage in this practice because their identity is well known to the Deputy Vice Chairman who rewiew their decisions." (Appendix:C-11,12)

b) National: Hearings - Richard O'Dell, VP., VVA, as obtained from informal BVA grievance, Chief BVA Board Member, re FOIA request.

> " Failing to assign expanded (BVA) panels in an impartial manner: On a number of occasions, including a staff meeting on November 3, 1986, the Chairman admitted that on various occasions, either where there has been a dissent or a request for reconsideration, he has assigned another section on the basis of his expectation of what the outcome will be. This amounts to " shopping for judges " and has the effect of undermining the integrity of the Board.

(emphasis added) (Appendix: C-117,118)

4) Petitioner: Further, Re Hearings,

Petitioner complained that he had been denied hearings at sensitive and critical stages of the adjudication process. Also, he was denied personal BVA hearings in 1979 and 1980 when no one advised him that those hearings could be held by a traveling BVA panel in New York City. As a result, petitioner never asked for a traveling board hearing nor went to Washington, D.C. for a hearing.

a) National: SVAC hearing of July 7, 1988 (page 45), the importance of traveling board hearings is demonstrated by the fact that traveling board allowances rise to the level of 30.6 % in FY 87 from average BVA allowance rates of 12.7 %. (App: C-60.61)

b) National:Hearings - Kenneth Eaton, BVA Chairman

" At the Committee's hearing, the BVA Chairman (Eaton) testified that because of the limited number of such traveling Section hearings, the BVA did not routinely tell claimants about this option. Specifically, Mr. Eaton noted, " [I]f you advertise that too much, you are going to get more than you can handle". (emphasis added) (Appendix:C-60-65)

note: The fact is, the BVA never told the petitioner or other veterans that they were entitled to a traveling board hearing in their own home locales. On the BVA (Form 1-9) no option is presented for selecting a hearing before a traveling board section in your own home locale. Consequently, without this knowledge, many veterans opt to proceed without a personal hearing, rather than travel to Washington, D.C., just as the petitioner, and other veterans have done when kept ignorant of the true circumstances.

The explantion for deception is clear :

" According to Mr. Eaton, the traveling board hearings are scheduled by giving veterans' service organizations a

certain number of hearings , and allowing the service officers to designate who receives a hearing. "

" When asked if there is a quota, Mr. Eaton replied, " In effect. It has to be that way. " (Appendix: C-65)

In other words, the BVA has a clandestine hearing quota necessitated by the fact that the BVA doesn't have the resources to provide the number of hearings which would be required. How does that reconcile with the requirements under 38 U.S.C. to grant veterans every possible consideration in enabling them to establish their entitlements ?

The foregoing clearly shows that the NVSO's are in league with the BVA to surreptitiously deny veterans hearings. How does that square with their fidiciary requirement to represent veterans ?

c) National: Hearings- T.A. Verrill, Adj. Officer, San Francisco, VARO

On April 20, 1981, Mr. Verrill wrote a letter to his section chiefs advising his

subordinates : " Although VAR 1103 permits a hearing anytime on any issue, we do not have the resources to operate in this way."

" We can always explain why a hearing is not appropriate at a particular stage in processing." " .... I know you are aware of these points but the appellant isn't." (Append:C-58,59)

Under the circumstances, veterans without attorneys, represented primarily by national service officer's are covertly being denied hearings at crucial and sensitive stages of the adjudicatory process under one pretext or another contrary to the spirit and intent 38 U.S.C. and the 38 CFR 's requiring hearings. Whether at Regional level or BVA level the result is the same. Who protects veterans ? No one, not even the national service officers'.

note: Mr. T.A. Verrill brought this system of denying veterans hearings at sensitive stages of the adjudicatory process from the Philadelphia Regional Office where he was previously assigned.

When the Central Office in Washington, D.C. found out about the surreptitous denial of hearings, instead of being fired, Mr. Verrill was rewarded with bonuses and other bureaucratic awards. They encourage it. (Appendix : C- 18)

Summary re 12 B (6)

From the foregoing and far more, it is clear that petitioner has a worthy cause of action which can be validated in any court, if this writ is granted. Veterans deserve an opportunity to be heard.
A nation of laws - not men, will not long endure such bureaucratic injustice which demeans everything we hold dear.

Errors in Reasoning or Case Law: Re Southern District Court of New York

Petitioner contends that both lower courts made 13 reversible errors in the facts,law and case law. Space limitations prevents the petitioner from addressing all of them

in the detail required.

1. At appendix: A-24, the District Court wrote : " The plaintiff has obviously not been deprived of his benefits .. because he was, in fact, awarded benefits ". Later, at App: A- 25 " Plaintiff, however, was granted benefits despite an alleged quota system. "

Such reasoning defies all logic. The District Court's contention that the plaintiff was not deprived of benefits due to a quota system, because he was in fact awarded something, is unrealistic.

a) A quota system must award some benefits, to someone, sometime or even Congress might smell a rat. It doesn't mean, however, that the recipients of awards were fairly compensated or that they weren't injured by the quota's existence.

b) Consider for a moment, those who received nothing although equally, if not

more deserving or more needy ? Were they injured by a quota system ?

c) **Consider those** who have been denied for twenty, thirty, forty or more years by the existence of a quota system ; and then inexplicably, the quota system smiles because of persistence, perserverance, better representation, happenstance or because some local Congressman suddenly became an influential member of the House Veterans Affairs Committee. **Even then,** what does this fortunate veteran get ? If he's lucky, maybe a fraction of what he was due - and what of the trauma caused for over 30 years; nevertheless, the Court says he wasn't harmed !!?

d) **What about those veterans** who simply passed on to another world ? What of their widows and orphans ? If under a quota system, a deserving veteran's claim could be denied, it follows that an undeserving claim could be approved on the

basis of favoritism or undue influence being exercised by either the NVSO's or an influential Congressman or Senator. The central theme of a quota system is - that it is not justice driven, and consequently, totally alien to the principles of fairness and impartiality.

The District Court apparently did not take appellant's allegation of a quota system seriously, nor did it appear to appreciate the threat it presents to our system of justice and the fundamental principles upon which this country was founded. And yet, the Court stated: " For the purpose of this motion only, the Court accepts as true the facts alleged in the complaint. " (App:A-11) If true, how could petitioner be dismissed on 12 (b) (6) ?

2. The Southern District Court held that the V.A.'s practices and procedures <u>were not</u> subject to judicial review (A-18,19) as were Statutes and Regulations under

Johnson v. Robision; as were hearing procedures, under Goldberg v. Kelly; and, as were both practices and procedures under Marozsan v U.S,(en banc)

The Southern District Court reasoned that it was supported in its conclusion to reject judicial review of the V.A.'s practices and procedures since a "conflict in circuits" was seen existing between the 5th Circuit (1977), Anderson v.Veterans Administration, and the 7th Circuit Court of Appeals (1988)- Marozsan,(App: A-18,19)

a) The District Court failed to address the hearing procedures required for due process under the Goldberg v Kelly holding. In fact the District Court never addressed Goldberg or the hearing procedures mandating judicial review thereof in order to insure due process.

note: little or none of the due process safeguards required under Goldberg are present in VA hearings and as alleged in

the " Complaint", and in Plaintiff's Memorandum, 5/1/89, in response to the Court Order.

b) The Johnson Court mandated judicial review of challenges to the constitutionality of published regulations and statutes. Could the District Court reasonably interpret, that the Johnson Court held that it was all right to challenge published statutes and V.A. regulations, but not the V.A. 's actions done covertly under unpublished practices and procedures ? Surely, actions speak louder than published words, and accordingly, require greater scrutiny, not less.

c) The Marozsan Court (en banc) had little difficulty in reaching the conclusion that practices and procedures are subject to judicial review, saying:

> " The reasoning of the Johnson and Traynor decisions mandates federal court review of the type of challenge to the V.A.'s procedures that Marozsan presents. It is hard to see how the

> Court would insist on the right to review the constitutionality of legislation, but hold immune from review all unconstitutional administrative actions taken pursuant to that legislation" Marozsan at 1476 (emphasis added)

note : Marozsan, like petitioner, was complaining about the various quota systems and the numerous " sub rosa " practices which denied him a fair and impartial hearing. In that regard this action is indistinguishable from Marozsan.

d) Moreover, the District Court was mistaken when it erroneously found that a diversity of opinion exists re the judicial reviewability of the practices and procedures issue between the 5th Circuit (Anderson) and the 7th Circuit Court of Appeals, en banc, re Marozsan. In fact, no such difference exists since Anderson relied upon cases much before Goldberg and Johnson. However, one surely exists now between the 2nd and 7th.

e) Consider the consequences of the

District Court's failure to judicially review the V.A.'s practices and procedures under the following circumstances:

*) **Assuming the V.A.** were to adopt unpublished procedures and/ or practices of approving claims for veterans born only on the fourth of July, what recourse would veterans have ?

*) **Assuming,** as the V.A. orally argued in Marozsan, at 1478 that the courts lacked jurisdiction under 211 (a) even when the V.A. denied claims solely on the basis of race, color and gender; and that the VA could not be " called to account for any method it uses in administering veterans' benefits laws, no matter how egregious. " Under such circumstances, how unconstitutional does it have to get before 211 (a) is struck down and veterans restored to first class citizenship.

*) **If the Southern District's ruling** were to prevail, jurisdiction over the above

described constitutionally interdicted practices and procedures would be denied unless published in statutes or V.A. regulations.

Consequently, once more we are confronted with the proposition that published practices incorporated in the statutes, rules and regulations can be challenged, while unpublished practices, however egregious, can be practiced in secret while the 2nd Circuit denies jurisdiction. **Petitioner submits** that such a holding would be outrageous in a country such as ours - but that's exactly where the 2nd Circuit is today.

*) **At present,** the 2nd Circuit holding re the procedures issue places itself at considerable variance with the logical extension of four Supreme Court decisions, Goldberg, Johnson, Traynor, Bowen; the overwhelming body (if not all) of Circuit and District Court opinion re the judicial

reviewability of the VA's procedures.

Under the circumstances, only this Court can resolve the conflict between the 2nd and 7th Circuits as to whether the practices and procedures issue is subject to judicial review or not.

3) The Southern District failed to consider plaintiff's equal protection arguments, as expressed in the "Complaint"

*) **Informal access** to the VA's adjudicatory personnel authorized NVSO personnel but denied pro bono and self represented veterans.(Gompf, C-40-43)

*) **Secret List of 12 influential Congressman** and Senators whose constituents are singled out for preferential treatment. (App: C-1-4)

*) **Veterans of Mississppi** receive twice the national average benefits of veterans residing elsewhere. It is no accident that Cong Montgomery (Miss) is HVAC Chmn. Residency matters at the VA. (App:C-94-97)

*) **Lack of codification** of BVA decisions results in many veterans with similar causes of action being treated differently. (Appendix: C-5-10)

4) The Southern District at Appendix A-23 of its opinion held that: " neither the Complaint nor the Memorandum delineate in what manner those procedures are unconstitutional." Later at A-25, the Court held that the plaintiff had failed to specify which VA practices and procedures were alleged to be unconstitutional.

The petitioner is absolutely baffled by the Southern District's assertion that he failed to state in what manner or which practices and procedures were unconstitutional.

*) **Being denied** a fair and impartial hearing is violative of the due process clause contained the 5th Amendment.

*) **Under the Goldberg holding** many of the 28 unfair practices and procedures

enumerated in appendix: A- 35-42, are contrary to the due process requirements of a fair and impartial hearing.

*) **Petitioner never said** that <u>any one</u> of the enumerated unfair practices and procedures was unconstitutional or a denial of due process, but instead asserted that it was <u>the totality thereof</u> which denied fundamental fairness in the adjudication of claims, and accordingly is unconstitutional.

5) **The Southern District** has clearly abused its discretionery power by attributing "...the real dispute in this case is that the VA has failed to give those benefits full retroactive effect"

Not one shred of evidence has been produced by either the defendants or the Courts to show that petitioner seeks judicial review and damages. **Common sense** alone would argue that the costs associated with this action dwarf any

possible recovery, so where's the beef ? Petitioner is dismissed because he brought a " disfavored action " to the 2nd Circuit, pure and simple, nothing else !

5) Bowen v Instant Case

The Supreme Court decision in Walters v Nars, 473 U.S.305, at 333 stated:

> " We think that the benefits at stake in VA proceedings which are not granted on the basis of need, are more akin to Social Security benefits .." (Emph Add)

***) It should be noted,** that the Eastern District Court and the 2d Circuit were unanimously in favor of permitting the victims to litigate the legality of the "sub rosa " policies and procedures used against them.

***) The Eastern District Court** found at 1115, that " evidence of a fixed clandestine policy against those with mental illness is overwhelming. " Also, at 1115: " Evidence at trial revealed that this covert policy was followed consist-

tently from 1978 until at least the early months of 1983. " (emphasis added.)

What should veterans say who have been victimized by similar and worse clandestine policies for over fifty years ?

*) **Further at 1124,** the E.D. Court found that: " Physicians were pressured to reach conclusions contrary to their own professional beliefs..... " All of this comes as no surprise to veterans.

*) **It would be a tragic irony,** if this Court should hold that the systematic procedural " irregularities " which rendered Bowen subject to litigation were denied veterans who have been victimized longer, by far worse procedural irregularities.

Recusal

Judge Patterson said at oral argument that he was a potential litigant (never denied) having been victimized by some of the same procedures as those the Petitioner

complained about. Further, he is a material witness to those same VA procedures, which denied him notice, a physical examination and a hearing prior to having his claim terminated apparently without cause.

28 U.S.C. Sect 455 (d) (4) clearly states that no matter how small the interest involved, the judge must be recused since he has an interest no matter how small. Also, irrespective of what the petitioner agreed to at oral argument, it was clearly contrary to 28 U.S.C. 455 (e), which permits no waiver by any of the parties considering the circumstances surrounding this issue.

Conclusion

For all of the foregoing reasons and more petitioner requests that he be returned to the Southern District of New York, under another judge, to establish the validity of his allegations.

Dated: New York, N.Y.
June 25, 1990

Respectfully submitted,

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APPENDICES

Appendix - A

	pages
Decisions To Be Reviewed	
Order upon Petition for Rehearing and Suggestion for Rehearing en Banc	A-1-3
Opinion of the United States Court of Appeals for the Second Circuit	A-4-8
Opinion of the United States District Court for the Southern District of New York	A-9-28
Recusal: Judge Patterson at oral argument	A-29-34
Other Submissions: 28 Unfair Practices	A-35-42

Appendix - B

Constitution

Ist & Fifth Amendments B-1

Statutes

38 U.S.C. Sect 210 B-2

38 U.S.C., Sect 211 (a) B-2

38 U.S.C., Sect 3402 (a)(2) B-3

38 U.S.C., Sect 3404 (c) B-3

38 U.S.C., Sect 3405 B-3,4

38 U.S.C., Sect 4004 (c) B-4

28 U.S.C., Sect 455 B-4,5

Regulations

38 C.F.R. Sect 3.102 B-6

38 C.F.R. Sect 3.103 B-6

38 C.F.R. Sect 3.105 B-7

Appendix - C

(virtually all of the following originate from Congresional Hearings)

Witness/ Affiliation	Subject	Pages
BVA Chairman Preferential Signature List	Equal protection	C-1-4
R. O'Dell VP. VVA	Identical Cases Decided Differently, Courtesy Signatures	C-5-10
R. O'Dell VP. VVA	BVA Allowance Aberration	C-9,10
R. O'Dell VP. VVA	Due Process Courtesy Signature	C-10,11
R. O'Dell VP. VVA	Better to deny than allow	C-12-15
P. Cushman Pres.VDP	Due Process	C-16-21
G. Erspamer Attorney NARS	VA Destruction of Court Ordered Documents	C-22-26
Mcallister Wash. Post	Harrassment of " Deep Throat"	C-27-31
R. Abrams VA Emp.	Due Process White Paper	C-32-39

Witness/ Affiliation	Subject	Pages
Gompf Letter VA Director	Blackmail Due Process Equal Protection	C-40-43
J.N. Magill Director,VFW	Intimidated by Gompf letter	C-44-46
Dr.A.Pellerin BVA Emp.	Due Process Implausible decisions, no retroactive payment, trash outside medical opinions, conscience stricken testimony, intimidation.	C-47-55
J.L. Blum CBO	Veterans would increase allowances by 33%,if independent medical expert opinions were allowed	C-56,57
T.A. Verrill Adj. Officer	Vets denied hearings at critical stages of the VARO adjudication process	C58,59
K. Eaton BVA Chmn.	BVA hearings covertly denied, subject to quota.	C-60-65
4 Members of Congress	Letter to Wash. Post Blackmail of NVSO's, inter alia	C-66-69
K. Blaylock Pres.AFGE	Due Process, inconsistent and uncontrolled decionmaking, no effective check on impermissable actions	C-70-75

Witness/ Affiliation	Subject	Pages
N. Johnson BVA Employee	Covert quota system, shelve notions of due process, decisions based on race, close decisions always went against veterans, dirty tricks.	C-76-84
D. Schwab National Officer,VFW	Due Process. Many service officers' increasingly disappointed over denial of cases which have considerable merit.	C-85-93
S. Cooper VDP	Equal Protection - Miss. receives twice the national average in benefits.	C-94-97
Kenneth Eaton BVA Chairman	Statistics, evidencing virtually no change in allowance rates - suggesting a quota	C-98-101
B. McAllister Wash Post	New Court(COVA) gives preference to VA.	C-102,03
BVA Members	Informal Grievance Production Quota, Courtesy signatures Due Process	C104-110
R.O.Muller Pres. VVA	No uniformity of decisionmaking	C-111-115
Chief Member, BVA Panel	Shopping for Judges Intimidation of panel by BVA Chairman	C-116-118

Order upon Petition for Rehearing and Suggestion for Rehearing in Banc (Circuit Court No. 89-6182, February 28, 1990):

"UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

"At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of February, one thousand nine hundred and ninety.

IRWIN COOPER,

Plaintiff-Appellant,

against

DOCKET NUMBER 89-6182

THE UNITED STATES OF AMERICA, THE ADMINISTRATOR OF THE UNITED STATES VETERANS ADMINISTRATION, and THE UNITED STATES VETERANS ADMINISTRATION

Defendants-Appellees.

"A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellant IRWIN COOPER

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH

Clerk"

ORDER UPON APPEAL (Circuit Court No. 89-6182, January 12, 1990):

"UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

"At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of January, one thousand nine hundred and ninety.

Present:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND

HONORABLE RICHARD J. CARDAMONE

HONORABLE FRANK X. ALTIMARI

Circuit Judges

- -

IRWIN COOPER,

Plaintiff-Appellant,

O R D E R

-against- Docket No.

89-6182

THE UNITED STATES OF AMERICA, THE ADMINISTRATOR OF THE UNITED STATES VETERANS ADMINISTRATION and THE UNITED STATES VETERANS ADMINISTRATION,

Defendants-Appellees.

- -

Irwin Cooper appeals from a July 20, 1989 judgment of the United States District Court for the Southern District of New York (Patterson, J.), dismissing his complaint and denying plaintiff's motion that the district court judge recuse himself. Plaintiff, a World War II veteran who suffers from a physical disability which arose during his service, challenged a 1981 decision of the Board of Veterans Appeals (BVA) declining to award plaintiff disability benefits retroactive to 1946.

Defendant appealed the BVA's decision to the district court, claiming, inter alia, that the Veterans Administration's (VA) procedures are unconstitutional for failing to supply sufficient due process. In response to these general accusations of due process violations, the district court ordered the plaintiff to separately state "each constitutional violation alleged to have occurred in connection with the denial of retroactive benefits to the plaintiff by the Veterans Administration." Plaintiff submitted a 52 page memorandum which, despite its great length, failed to specify any particular rule or procedure employed by the BVA in denying plaintiff retroactive benefits to 1946 which plaintiff found unconstitutional. Further, though plaintiff's memorandum and his complaint allege that the VA's process

is inadequate when viewed in its entirety, he failed to show how that process injured him in the denial of retroactive benefits by the BVA in its 1981 decision. The district court therefore dismissed plaintiff's complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12 (b) (6).

Plaintiff had also motioned for Judge Patterson to recuse himself after Judge Patterson had informed the parties that he had been a World War II veteran who had received disability payments from the VA for a period after the War. Plaintiff asserted four grounds for recusal under 28 U.S.C. § 455, all of them stemming from the fact that Judge Patterson had been an injured veteran who had received VA benefits and that this case involved the dispersement of VA benefits. Judge Patterson denied

plaintiff's motion, finding that a reasonable person would not infer that he would be biased or prejudiced against the plaintiff, that it was highly unlikely that he would become a litigant involved in the issue in front of him, that he had no personal interest in the outcome of the case, and that he lacked any personal knowledge of the plaintiff or the facts of the case and was therefore not likely to become a material witness.

We affirm substantially for the well-articulated reasons given by Judge Patterson in his written opinion dated June 22, 1989.

The judgment of the district court is affirmed.

Ellsworth A. Van Graafeiland, U.S.C.J.

Richard J. Cardamone, U.S.C.J.

Frank X. Altimari, U.S.C.J.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (88 CIV. 6106 (RPP), JUNE 22, 1989)

"UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

IRWIN COOPER,

Plaintiff,

88 Civ. 6106 (RPP)

-against-

MEMORANDUM AND ORDER

THE UNITED STATES OF AMERICA, THE ADMINISTRATOR OF THE UNITED STATES VETERANS ADMINISTRATION, and THE UNITED STATES VETERANS ADMINISTRATION

Defendants.

----------X

Robert P. Patterson, Jr., U.S.D.J.

"Plaintiff, a veteran, has brought this action challenging decisions of December 14, 1979 and June 25, 1981 of the Board of Veterans Appeals (the "BVA") which granted him veterans disability benefits retroactive to August 24, 1978, but not for the earlier period of from September 4, 1946 (when his application for such benefits was initially denied) through August 24, 1978. Plaintiff alleges that (1) the provision of 38 U.S.C. § 211(a) precluding judicial review (the "Judicial review Preclusion") is unconstitutional, (2) the provisions of 38 U.S.C. §§3404(c)(2) and 3405(1), limiting attorneys' fees in connection with veterans benefits claims (the "Attorneys' Fees Limitation") are unconstitutional, and (3) he was denied due process in

connection with the denial of retroactive benefits. [1]

The case is now before the court on defendants' motion to dismiss the complaint for (1) lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12 (b)(1), and (2) failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12 (b)(6).

BACKGROUND

For the purpose of this motion only, the Court accepts as true the facts alleged in the complaint. See Tucker v. Bay Shore Union Free School, No. 88-7804

[1] On November 18, 1988, Congress enacted the Veterans' Judicial Review Act, Pub. L. 100-687, and amended the Judicial Review Preclusion and Attorneys' Fees Limitation provisions. These provisions now permit judicial review and attorneys' fees in connection with V.A. claims (with certain limitations). However, these amendments are not relevant in the present case because they do not have retroactive effect.

(2d Cir. Apr. 18, 1989). Plaintiff served in the United States Navy from June 1944 through May 1946. Complaint, ¶ 23. After his discharge, plaintiff filed a claim with the Veterans' Administration (the "V.A.") for disability benefits. The V.A. denied his application on September 4, 1946. Complaint, ¶ 25. Plaintiff filed a second "reopened" claim approximately two years later, which the V.A. denied in October 1949. Complaint, ¶ 27. In November 1949, plaintiff filed a third claim, which the V.A. denied in June 1950. Complaint, ¶ 29. In November 1954, plaintiff filed a fourth claim which was also denied. Complaint, ¶¶ 31-32. Plaintiff again reopened his claim, which the V.A. denied for the fifth time in January 1955. Complaint, ¶¶ 36-37.

On August 25, 1978, plaintiff reopened the matter by filing a sixth

claim, which the V.A. denied in January 1979. For the first time, plaintiff invoked the administrative appeals procedures, and a hearing was held in July 1979. Complaint, ¶ 40. On December 14, 1979, the BVA issued a decision granting plaintiff benefits retroactive to August 24, 1978, the date plaintiff's claim was reopened. Complaint, ¶ 47. In August 1980, plaintiff wrote a letter to the V.A. contesting the decision because it denied retroactive benefits for the period of September 4, 1946 through August 24, 1978. Complaint, ¶ 47. Thereafter, the BVA refused to reconsider its decision. Complaint, ¶¶ 50-56.

On September 1, 1988, plaintiff commenced this action, requesting the following relief:

1. An Order declaring unconstitutional on their face and as

applied to plaintiff the (a) Judicial Review Preclusion, and (b) Attorneys' Fees Limitation;

2. An Order directing defendants to conduct proceedings and reconsider their previous decision limiting retroactive benefits;

3. An Order requiring defendants, in connection with the court ordered reconsideration, to comply with the requirements pursuant to (a) 38 C.F.R. § 3.103 "to assist a Claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law . . . ", and (b) 38 C.F.R. § 3.102 that all "reasonable doubt be resolved in favor of the claimant;"

4. An Order appointing a special master to oversee, monitor and

report back to this court the progress of the V.A.'s proceedings; and

5. A Judgment for costs, disbursements and such other relief as this court deems just and proper.

DISCUSSION

In both Traynor v. Turnage, 108 S. Ct. 1372, 1379 (1988) and Johnson v. Robison, 415 U.S. 361, 367 (1974), "'the Supreme Court recognized the constitutionality of the [Judicial Review Preclusion].'" Rosen v. Walters, 719 F.2d 1422, 1423 (9th Cir. 1983) (quoting Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978)). Although the Judicial Review Preclusion was not directly challenged in Traynor v. Turnage and Johnson v. Robison, the Supreme Court by clear implication recognized the Judicial Review Preclusion by narrowly construing and applying it.

In both cases, the Supreme Court held that the Judicial Review Preclusion only precluded review of legal and factual determinations with regard to benefit's claims, but not the constitutional challenges to veterans' benefits legislation. Traynor v. Turnage, 108 S. Ct. at 1379; Johnson v. Robison, 415 U.S. at 367. The Supreme Court "determined that 'neither the text nor legislative history of [the Judicial Review Preclusion]' provided the requisite 'clear and convincing' evidence of congressional intent to foreclose judicial review of challenges to the constitutionality of a law administered by the Veterans' Administration." Traynor v. Turnage, 108 S. Ct. at 1378 (citation omitted). Moreover, as thus construed, various federal circuit and district courts have consistently interpreted

Johnson v. Robison as recognizing the constitutionality of the Judicial Review Preclusion. See Rosen v. Walters, 719 F.2d at 1423; Moore v. Johnson, 582 F.2d at 1232; Anderson v. Veterans Administration, 559 F.2d 935, 936 (5th Cir. 1977).

In Traynor v. Turnage, the Supreme Court held that not only is V.A. benefits legislation subject to judicial review, but the validity of a particular V.A. regulation, in light of a subsequent statute "whose enforcement is not the exclusive domain of the V.A.," is also subject to review. Traynor v. Turnage, 108 S. Ct. at 1379. Traynor v. Turnage clearly dictates that the constitutionality of a particular V.A. regulation would also be subject to

judicial review. [2] Moreover, the Second Circuit has interpreted Johnson v. Robison as holding that the "judicial review of the constitutionality of veterans' benefits regulations was not barred by the Judicial Review Preclusion." Traynor v. Williams, 791 F.2d 226 (2d Cir. 1986), rev'd on other grounds, Traynor v. Turnage, supra.

There remains the issue of whether or not the Judicial Review Preclusion precludes review of the constitutionality of V.A. procedures and practices. There appears to be a conflict in the circuits with respect to this issue. Compare Anderson v. Veterans Administration, 559

[2] The Supreme Court has not specifically decided whether or not the constitutionality of a particular V.A. regulation is subject to judicial review. However, it would seem anomalous if a court could review the validity of a regulation as it relates to a statute but not the Constitution.

F.2d 935 (5th Cir. 1977) (per curiam) (Judicial Review Preclusion precludes review of the constitutionality of V.A. hearing procedures) with Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988) (Judicial Review Preclusion does not preclude review of the constitutionality of V.A. procedures and practices). The Second Circuit has held that "to the extent the complaint seeks damages for the V.A.'s denial of due process in handling his claim, we agree with those circuits that have held that one may not "circumvent the [Judicial Review Preclusion] by seeking damages on a constitutional claim arising out of the denial of benefits." Pappanikoloaou v. Administrator of Vet. Admin., 762 F.2d 8, 9 (2d Cir. 1985) (citations omitted). In reaching its decision, the Second Circuit relied on, among other cases, Anderson v.

Veterans Administration, 559 F.2d 935. Id. at 9.

Plaintiff's complaint is not a model of clarity. It alleges generally that the V.A.'s "policies, procedures, rules and regulations" are unconstitutional. Therefore, the Court ordered the plaintiff's counsel to separately state "each constitutional and statutory violation alleged to have occurred in connection with the denial of retroactive benefits to the plaintiff by the V.A. Each such due process violation shall not be conclusory but shall set forth the facts upon which it is based, and identify the specific rule, regulation, adjudicative procedure, or statutory provision relating to such violation." (the "Order").[3] In response to the Order,

[3] This Order, which was signed and issued on April 14, 1989, confirmed the Court's

plaintiff submitted Plaintiff's Memorandum Pursuant To Order Of Judge Robert P. Patterson Dated April 14, 1989, consisting of fifty-two pages (the "Memorandum").

V.A. BENEFITS LEGISLATION

Based on the complaint and the Memorandum, it is clear that plaintiff is alleging that only two statutory provisions of the V.A. benefits law are unconstitutional - the Judicial Review Preclusion and the Attorney's Fee Preclusion. Both of these claims fail as a matter of law. As discussed above, the Judicial Review Preclusion has been held to be constitutional. The Attorneys' Fees Preclusion has also been held to be constitutional. In Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305

Order issued at oral agrument the day before.

(1985), the Supreme Court held that the Attorneys' Fees Limitation is constitutional under both the First Amendment and Due Process Clause of the Fifth Amendment to the United States Constitution. Accordingly, the plaintiffs' complaint, insofar as it seeks an Order declaring the Judicial Review Preclusion and the Attorney's Fee Limitation to be unconstitutional, fails as a matter of law to state a claim upon which relief can be granted, and is dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

V.A. REGULATIONS

Although plaintiff alleges that the V.A.'s regulations and rules are unconstitutional, the complaint and Memorandum are both devoid of references

to the specific regulations or rules alleged to be unconstitutional.

V.A. PROCEDURES, PRACTICES

Plaintiff's complaint and Memorandum contain numerous conclusory allegations that the V.A.'s procedures and practices are unconstitutional. As discussed above, there is some authority to support a holding that this Court may review the constitutionality of the V.A.'s procedures and practices. However, neither the complaint nor the Memorandum delineate in what manner those procedures or practices are unconstitutional. Indeed, the plaintiff's position seems somewhat anomalous. The Plaintiff received disability benefits retroactive to August 24, 1978 after a proceeding conducted under procedures and practices adhered to by the V.A. which are alleged to be

unconstitutional by plaintiff in this action. Thus, the real dispute in this case is that the V.A. has failed to give those benefits full retroactive effect. The V.A.'s procedures and practices adhered to in connection with its series of denials of benefits to plaintiff occurring from September 1946 through January 1955 are no longer relevant or at issue. The only V.A. procedures or practices which continue to be relevant or at issue in this action are those adhered to by the V.A. in connection with its decision to limit the retroactive effect of the benefits. The Plaintiff has obviously not been deprived of his benefits by those procedures and practices because he was, in fact, awarded benefits under those procedures and practices in effect.

In any event, both the complaint and Memorandum (despite the Order) fail to specify which V.A. procedures or practices adhered to in connection with such decision are alleged to be unconstitutional. An example characteristic of such failure is plaintiff's conclusory claim in the Complaint (¶¶ 61-63) and the Memorandum that the V.A. adheres to an allegedly unconstitutional "quota system." Plaintiff, however, was granted benefits despite the alleged quota system. There is specification of how the alleged quota system was used in an unconstitutional manner to cause the V.A. to limit the retroactive benefits.

As evidenced by his failure to satisfy the Order, the Court concludes that plaintiff is attempting to circumvent the Judicial Review Preclusion with

respect to the V.A.'s decision limiting his retroactive benefits by casting his complaint as a "constitutional claim arising out of the denial of benefits." Pappanikoloaou, 762 F.2d at 9. Accordingly, plaintiff's complaint fails as a matter of law, and is dismissed for the foregoing reasons.

The Court disclosed at time of argument of defendants' motion that he was a World War II veteran who had received disability benefits, which were discontinued. There was no objection at that time to the Court sitting on defendants' motion. On June 2, 1989 plaintiff filed a motion for my recusal under 28 U.S.C. § 455. It is denied for the following reasons.

The Court does not believe a reasonable person, in the context of the issues presented in this case, would infer

that bias or prejudice against plaintiff exists (a requirement of 28 U.S.C. § 455(a)), which would foreclose impartiality of judgment. Dee v. Institutional Networks Corp., 559 F. Supp. 1282, 1284 (S.D.N.Y. 1983); Markus v. United States, 545 F. Supp. 998, 1000 (S.D.N.Y. 1982). The likelihood of the Court being a potential litigant is too tenuous, as counsel for both parties apparently recognized by their waiver at time of argument of defendants' motion.

With respect to 28 U.S.C. § 455 (b)(4), the Court's interest in the outcome is too speculative, United States v. Alabama, 828 F.2d 1532, 1542 (11th Cir. 1987), cf. also In re City of Houston, 745 F.2d 925, 929-930 (5th Cir. 1984).

With respect to 28 U.S.C. § 455 (b)(1), the Court lacks the required personal knowledge of plaintiff, Mr.

Cooper, or the facts in the present case. Paschall v. Mayone, 454 F. Supp. 1289, 1300 (S.D.N.Y. 1978); Laird v. Tatum, 409 U.S. 824, 835 (1972). Furthermore, the Court is certainly not, as plaintiff alleges, a material witness under 28 U.S.C. § 455 (b)(5)(iv).

Accordingly, all grounds for recusal put forth by plaintiff, having been examined, are found to be without merit and are hereby dismissed.

SO ORDERED.

Dated: New, York

June 22, 1989

Robert P. Patterson, Jr.

U.S.D.J."

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (88 CIV. 6106 (RPP), JUNE 22, 1989)

"UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

IRWIN COOPER,

Plaintiff,

88 Civ. 6106 (RPP)

-against-

THE UNITED STATES OF AMERICA, THE ADMINISTRATOR OF THE UNITED STATES VETERANS ADMINISTRATION, and THE UNITED STATES VETERANS ADMINISTRATION

Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR

RECUSAL OF PRESIDING JUDGE

ROBERT P. PATTERSON,JR.

{*** Only the "FACTS" portion of said "MEMORANDUM AND ORDER" appear below}**

{MEMORANDUM PAGE 2} "FACTS

"At oral argument, on April 13, 1989, presiding Judge Patterson voluntarily informed the parties that he too was a veteran of World War II., had been granted a disability award and that the award had been discontinued without notice of any hearing or any other notice other than notice of discontinuance.

A transcript of the oral argument was made at the request of defendants. The following colloquy is taken from pages 2 through 5 of said transcript: (See Exhibit "A").

{TRANSCRIPT PAGE 3} "THE COURT: Before we begin, I think I should notify both parties that I was injured in World War II. as a veteran. I got a disability award as a veteran, and that disability award was discontinued -- I don't know why -- just about the time I got through law school. But I want you to be aware of my personal history with the knowledge that you may feel that that personal history would render me subject to bias one way or another in connection with this matter. (emphasis added).

MS. GARDINER: No

MR. LASKER: I have no objection.

THE COURT: I mean I just mention it because I don't recall that I received much notice other than the fact that it was discontinued, and I don't believe I got any notice other than the fact that it was discontinued, and I don't believe I got any notice of a hearing, or any other notice. It was just discontinued, is my recollection. And I kind of wondered what happened, and I didn't object because I was making the princely sum of $3,000 a year, which was the beginning salary for young lawyers."

{TRANSCRIPT PAGE 4} "THE COURT: I think I got a notice, my recollect is, but not that there was any

opportunity to appeal it or anything of that sort."

{TRANSCRIPT PAGE 5} "THE COURT: I forgot one other thing I should have mentioned. What happened to me was the end of my elbow has been almost clipped off. I have no tip of my elbow, and it was done in service, no question. And they acknowledged that I had a benefit . . . . . As a matter of fact, I'm now getting a little rheumatism, or what have you, in my fingers, which the expert witness told me -- in the case I recently tried, Mal-practice action -- that was probably as a result of the service-connected injury. So I'm a potential --" (emphasis added).

MS. GARDINER interrupted Judge Patterson precisely at that point - so we never got to find out "So I'm a potential . . " what? - litigant? - Is that what Judge Patterson was about to say?

MS. GARDINER interrupting stated, at page 5, line 16: "You'll be happy to know that you may reopen your claim and it will not be time-barred administrati·ely, your Honor."

SPECIFIC DENIALS OF FUNDAMENTAL FAIRNESS AND DUE PROCESS

1. **No right** to retain an attorney.
2. **No right** of subpoena.
3. **No right** of independent appeal from rating panels or boards whose personnel may have rendered the initial decision.
4. **No right** of independent medical testimony to resolve differences in medical opinion.
5. **No right** of cross examination.
6. **No right** to compel V.A. to address or confront evidence.
7. **No right** to copies of VA regulations used against veterans.
8. **No right** to obtain answers to questions whether written or oral.
9. **No right** to discuss case with VA officials, so that a greater

understanding of the outstanding issues could be obtained, facilitating a quicker and less traumatic resolution thereof.

10. **No right** to question V.A.'s version of the facts, no matter how erroneous, irrespective of how much evidence a veteran may have to the contrary.

11. **No right** to fair and impartial consideration of claims, in view of a VA quota system of dispensing justice. Only one in eight claims are allowed or approximately 12.5%, according to VA calculations, which are disputed, as being approximately 6%.

12. **No right** to investigate or explore reasons for missing files or records which could prove beneficial to veteran.

13. **The VA** is not subject to the Administrative Practices Act (APA).

Consequently, procedures and/or practices are routinely changed by the Agency at the VA's sole discretion without input from concerned citizens, groups or organizations.

14. **No right** to personal hearings despite regulations to contrary.

15. **Claims are often denied** for failure of veterans to answer correspondence never sent.

16. **Inordinate delays** in answering correspondence - often replies take three months or more.

17. **Responses to correspondence**, are often vague, obtuse and couched in bureaucratic language devoid of meaning.

18. **Questions deemed repetitious**, are not answered - despite the fact that no answers were forthcoming previously.

19. **Little or no assistance** in developing claims is provided despite laws, regulations and statutes requiring same.

20. **In a rush to judgment**, the VA often renders decisions without benefit of service or benefit records and without facts bearing on the merits of the claim.

21. **Hearings** are often held without notification to the veteran.

22. **After hearings are conducted**, decisions are often rendered by personnel not present at the hearing.

23. **VA rules**, regulations and operating procedures are complex, confusing, contradictory, voluminous and subject to constant change.

24. **Often the VA hires** unqualified or incompetent Doctors. Such Doctors are placed into sensitive positions

requiring them to rubber stamp medical decisions at the rate of one per minute. Usually, such personnel are unable to secure employment elsewhere, hence, easily intimidated.

25. **Veterans** are **not granted** the **benefit of the doubt** in accordance with Title Law # 38 despite VA testimony to the contrary.

26. **Wishing to deny claims**, the VA often invents medical theories out of whole cloth. Such theories usually contradict current or past medical wisdom.

27. **Courtesy decisions (signing off on decisions, not examined)**, panel packing [(deck stacking) selectively adding members to panels to insure claim denials], unrealistic production goals, monetary awards, etc., contribute to a climate of doubt,

suspicion and betrayal of veterans' interests.

28. **No uniformity in decision making** due to the VA's failure to codify prior decisions. Precedents resulting therefrom are simply not available to claimants or Agency personnel seeking guidance or uniformity.

Under the due process deficiencies and deprivations enumerated hereinabove and hereunder, veterans cannot get a fair and impartial hearing. So constituted, VA procedures are woefully inadequate to properly develop the facts upon which claim decisions must rest. Accordingly, if veterans are denied access to the courts under 211(a) and must litigate their claims solely under VA auspices - without benefit of counsel, under archaic,

unprofessional, cruel and inhuman practices long since outlawed in western society, they will continue to be victimized and abused.

Due process in administrative proceedings of a judicial nature requires conformity to fair practices of Anglo-Saxon jurisprudence, which usually is equated with a fair hearing. Although strict adherence to the common-law rules of evidence is not required, the parties must generally be allowed an opportunity to know the claims of the opposing party, to present evidence to support their contentions, and to cross-examine witnesses for the other side. Nothing approaching fair practices normally associated with our American concept of justice has been provided plaintiff or thousands of abused veterans.

Based upon the foregoing, the 28 Unfair VA operating procedures and practices are constitutionally inadequate to resolve veterans' claims in a fair and impartial manner. The right to procedural due process is not conferred by legislative grace, but by constitutional guarantee.

Accordingly, 38 U.S.C. § 211(a) violates, this plaintiff's and other veterans first and fifth amendment rights."

{Emphasis added}

CONSTITUTION

First Amendment:

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for redress of just grievances."

Fifth Amendment:

> "No person shall be held to answer for a capital, or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES

38 U.S.C. §210(b) (1979):

> "The Administrator, under the direction of the President, is responsible for the proper execution and administration of all laws administered by the Veterans' Administration and for the control, direction, and management of the Veterans' Administration. Except to the extent inconsistent with law, he may consolidate, eliminate, abolish, or redistribute the functions of the bureaus, agencies, offices, or activities in the Veterans' Administration, create new bureaus, agencies, offices, or activities therein, and fix the functions thereof and the duties and powers of their respective executive heads."

38 U.S.C. §211(a) (1979):

> "On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

38 U.S.C. §3402(a)(2) (1979):

"The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized."

38 U.S.C. §3404(c) (1979):

"The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees-

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed."

38 U.S.C. §3405 (1979):

"Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be

fined not more than $500 or imprisoned at hard labor for not more than two years, or both."

38 U.S.C. §4004(c) (1979):

"The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer."

28 U.S.C. §455(a), (b), and (e)

"(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

"(4) He knows that he, individually ***** has a financial interest (legal or equitable interest, however small) in the subject matter in controversy ***** or any other interest that could be substantially affected by the outcome of the proceeding;

"(5) He *****

"(iv) is to the judges knowledge likely to be a material witness in the proceeding.

"(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is proceeded by a full disclosure on the record of the basis for disqualification."
(emphasis added)

REGULATIONS

38 C.F.R. §3.102 (1989) REASONABLE DOUBT

"It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. *****

38 C.F.R. §3.103(a),(c). (1972)

"(a) Statement of policy. Proceedings before the Veterans Administration are ex parte in nature. It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government. *****

"(c) Hearings. Upon request a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of this part. *****

38 C.F.R. §3.105(a)

"(a) Error. Previous determinations on which an action was predicated, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision." *****

{EMPHASIS ADDED}

PERSONAL SIGNATURE LIST" OF CHAIRMAN KENNETH E. EATON, BOARD OF VETERANS APPEALS:

"Office of the Chairman
Board of Veterans Appeals
Washington, D.C. 20420

March 9, 1987

"MEMORANDUM
No. 01-87-10

Subj: **Chairman's Personal Signature List**

1. PROCEDURE

When the following persons have **expressed an interest** in a case, and correspondence is being directed to the Capitol Hill offices, the case, after

processing through AIRS and prior to dating and dispatch of correspondence **will be routed through the Chairman's office** to the Executive Assistant **for review and signature**. Where a letter is being sent to the district offices, it should not be sent to the Executive Assistant but rather should be signed by the Chief of the Section preparing the correspondence, e.g., Chief, Special Correspondence and Inquiries Section; Chief, Hearing Section.

2. COMPOSITION

The Chairman's personal signature list will be composed of the following Senators and Congressmen.

Senators

Alan Cranston, Chairman

Senate Veterans' Affairs Committee

Frank H. Murkowski

Alan K. Simpson

Mark C. Hatfield

Thomas A. Daschle

CONGRESSMEN

G.V. Montgomery, Chairman, House Veterans' Affairs Committee

Gerald B. H. Solomon

John Paul Hammerschmidt

Jim Wright, Speaker of the House

Denny Smith

Douglas Applegate

Don Edwards

3. RECISSION

a. Chairman's Memorandum No. 01-85-24, dated September 27, 1985, subject:

Chairman's Personal Signature List, is hereby rescinded.

b. This memorandum is automatically rescinded December 31, 1987.

KENNETH E. EATON

Chairman"

{BOLD PRINT EMPHASIS ADDED}

STATEMENT PRESENTED BY RICHARD E. O'DELL, VICE PRESIDENT AND CHAIRMAN OF COMMITTEE ON ADVOCACY, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, ENTITLED: "VA APPELLATE ADJUDICATIONS AT THE BOARD OF VETERANS APPEALS", BEFORE THE HOUSE OF REPRESENTATIVES, HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HEARING CONCERNING "OVERSIGHT OF VA'S DISABILITY COMPENSATION PROGRAMS". HEARING BOOK PAGES 95 THROUGH 195.

{***** Statement page 5}

"Significant Variances
Between Different Sections
of the BVA

"Kenneth E. Eaton, Chairman of the Board of Veterans Appeals, testified at an

oversight hearing on the operation of the BVA before the Subcommittee on Compensation, Pension and Insurance of the House Committee on Veterans Affairs in 1985 and again on October 6, 1987. Mr. Eaton, responded to a question from Chairman Applegate in 1985 by saying "[y]es, indeed, it is quite true that there is what I might say is a significant variance between different sections of the Board and how they see these cases. . . ". The VVA and the American Legion have each, in the past, pointed out similar problems (Exhibit C, footnote 3 {***** **omitted**})

During the 1985 and 1987 hearings when Mr. Eaton testified, it would have been very helpful if production statistics for each of the 21 sections of the BVA had been available. These production statistics show allowance rates, denial rates and remand rates for each of the

Board's 21 sections. Had they been available they would likely have shown substantial differences in allowance rates, denial rates and remand rates between certain sections of the Board that handle similar cases.

"The VVA has obtained one such document from sources within the BVA and, indeed the differences we have suspected are apparent. Allowances overall for the last quarter of FY 1987 for all Board sections ranged between 7.9 percent and 18.6 percent. Denials overall for the same quarter ranged between 55.6 percent and 82 percent. Remands ranged between 6.9 percent and 31.6 percent (Exhibit D {***** **omitted**}). The VVA believes the variations in these production statistics show that the testimony of the Chairman of the BVA regarding the "significant variances between different sections of

the Board is indeed very significant. It is so significant, in our judgment, that it has become apparent that a higher reviewing authority ought to be made available on this basis alone in order to protect veterans from those "variances" in the decisions rendered on veterans benefits.

Moreover, not only are there variances in the decisions of the Board's sections, but equal and even identical cases are decided differently (Exhibit C, pg. 7 {***** **omitted**}). This fact, attested to the BVA Chairman, stands in direct violation of federal regulation, 38 CFR 3.101 (Exhibit E {***** **omitted**})."

*****

{Statement page 11} "An interesting corralary to the production credit limits in cases involving multiple issues is the

affect additional credits in individual cases might have on overall BVA allowance rates. Over many years the BVA annually has approved about 13 percent of the appeals adjudicated. This rate has remained so constant over the years that it has come to be termed "the quota" in some circles. If production credits were given for each issue decided in each case by the BVA, it is likely that allowance rates would decline precipitously as denials soared.

Indeed the VA's Veterans Appeals Control and Locator System (VACOLS) which provides statistical information on allowances and denials "is blind to the reasoning behind any individual decision. If, in a four issue appeal, three issues are denied and one issue is allowed, the VACOLS record will regard the BVA decision

as an allowance." (Exhibit L, pg 2 -{***** omitted}).

Moreover, if it is conservatively estimated that the typical appeal at the BVA contains three issues and if it is assumed that two of the three are disallowed, the annual allowance rate would decline two thirds from approximately 13 percent to 4.3 percent. *****

{***** Statement page 15}

"Courtesy Sign-Offs

"Another potential byproduct of production pressure and bonus incentives is particularly troubling. This is the practice of some Board members in signing off on a claim decision without even reviewing the file. The danger for veterans is one of being denied due

process as prescribed by the laws governing the way appeals are supposed to be adjudicated.

"The May 11, 1987 Informal Grievance cited earlier in this statement (Exhibit J, pg 2 {***** omitted}) discusses courtesy sign-offs as follows: "Another, and perhaps the most serious manipulative method of exploiting the current system is by obtaining signatures on decisions by Board Members (or Acting Board Members) who sign the decisions despite not having reviewed the case. This so-called 'courtesy' system not only deprives claimants from a review to which they would otherwise be entitled, but is also used to artifically increase the production of decisions. We need not identify those sections that regularly engage in this practice because their

identity is well known to the Deputy Vice Chairmen who review their decisions.

"With regard to the same system of 'courtesies' any section member can give an 'in house courtesy' signature, thereby accomplishing the same result as obtaining a 'courtesy' signature outside the section. All that is required are cooperative Board Members who are mainly motivated by monetary awards rather than concern for proper adjudication of claims.

"The undersigned are of the opinion that the pressures to meet goals or quotas (or even to increase allowance rates) are illegal."

"We find it particularly troubling that the "courtesy" is frequently exercised by the physician member." *****

{Statement page 21} "The writer goes on to say "[a]ll promotions, bonuses and other rewards are based almost exclusively on productivity, with only lip service being paid to quality. Sections are in competition with each other for a yearly bonus, which is paid to the sections with the highest productivity over the year, with the largest share going to the Chief Member. This encourages the Chief Member of each section to focus on getting the cases out, so to speak, regardless of quality or whether a fair result is reached in the case or not. (The Chief Member of the section I was in at the time of my retirement, although a decent person overall, did not view favorably my dissents in favor of the veteran or other claimant, which he felt slowed down the productivity of the section and impaired his chances for the yearly bonus . . . It is my belief, based on my 20 years'

experience with the BVA, that the agency is not discharging its duties and responsibilities toward the veterans of this nation and their survivors, in the spirit which Congress intended and that judicial review of BVA decisions, and lifting of the $10 limitation on attorneys' fees, would greatly benefit veterans and other claimants for Veterans Administration benefits. In my judgment, the Vice Chairman and most board members, whether law members or medical members, have an anti-claimant orientation, and little sympathy for the veterans' benefits program, which they view as a huge give-away. This view colors the decisions they reach on the cases before them. (Soon after I became a board member, I was called in by the Vice-Chairman, as a result of a dispute I was having with the Deputy Vice Chairman, in charge of one-half of the board to which my section was

assigned, and was told by the Vice Chairman that I was too allowance-prone, and that it was preferable to deny a case, when it doubt, than to allow it, as a denial always had a chance of being reversed later, whereas an allowance was final.) . . . Most board members, in my judgment, pay only lip service to the and regulations, disregarding those with which they are not in sympathy in order to reach the result they favor in the particular case . . . Some of the most anti-veteran, pro-denial Chief Members, with the lowest allowance statistics year after year, end up getting the largest bonus year after year, based on their production statistics."

{EMPHASIS ADDED}

ANONYMOUS "DEEP THROAT" TYPE LETTER RECEIVED BY MR. GORDON P. ERSPAMER (LEAD NARS ATTORNEY IN NARS V. WALTERS -- CASE NO. C-83-1861-MHP, N.D. CALIFORNIA). SAID LETTER WAS SUBMITTED AS "EXHIBIT E" (SEE HEARING BOOK PAGES 310 THROUGH 312) IN THE PREPARED STATEMENT (SEE HEARING BOOK PAGES 292 THROUGH 326) OF PHILIP E. CUSHMAN, PRESIDENT, VETERANS DUE PROCESS, INC. (VDP), BEFORE A JUNE 25, 1986, HEARING OF THE COMMITTEE ON VETERANS' AFFAIRS, HOUSE OF REPRESENTATIVES, NINETY-NINTH CONGRESS, SECOND SESSION, HEARING BOOK VOLUME II, SERIAL NO. 99-54

"May 29, 1986

"Gordon Erspamer, J.D.

NARS Advisory Board

78 El Camino Real

Berkley, CA 94705

Dear Mr. Erspamer:

"Your statement before the House Veterans Affairs Committee on May 20, 1986, was accurate and true. The Veterans Administration does not systematically provide veterans with adequate due process, especially for those claims disallowed for failure to submit requested evidence. Instead, those who manage adjudicative actions encourage premature denial of claims without notice in order to statistically enhance the data that measures the timeliness of claims processing. Managers of adjudication receive work credit for the volume of cases produced. If for example, end product controls are prematurely cancelled or recorded, the same credit can be received for working one claim four times

as for working four claims. These managers are then rewarded by both additional staffing and monetary bonuses under merit pay.

Your prepared statement includes a memorandum (Exhibit A) from T.A. Verrill, Adjudication Officer at the V.A. Regional Office, San Francisco. Mr. Verrill has been repeatedly warned by Central Office about encouraging his staff to prematurely disallow claims before addressing the issues claimed and was forced to appear in court to defend his policy of discouraging hearings to claimants. Central Office has chosen to ignore these repeated offenses and has in fact rewarded him with an exceptional evaluation and a bonus under merit pay. This award was fully concurred in and encouraged by officials at Central Office.

In many instances, this office, as well as some other offices, including: Washington Regional Office, St. Petersburg, Philadelphia, Baltimore, Los Angeles, and Winston Salem have been found to repeatedly "administratively" deny claims without proper processing. In many instances, a copy of the development letter requesting evidence is never placed in file, yet the claimant is disallowed for not replying to the request. Often, the evidence was not actually requested. This type of failure is considered only procedural in nature and is not counted as a substantive error against the station. On several occassions this was brought to the attention of the Compensation and Pension Director. In addition, there have been instances when several items of evidence have been requested. If some, but not all, of the evidence requested is

received, some stations will disallow the claim without notice for failure to submit requested evidence. Confirmation of these facts can be found by making a Freedom of Information (FOIA) request to Central Office to obtain from the Compensation and Pension Field Operations Section, a summary of the quality review and the specific claim numbers for cases involving error codes 15, 33, 52a and 54. These are maintained in the station quality review file as well as the station general operating file. The information regarding type of errors is also maintained on a personal computer by the Systematic Quality Control (SQC) section of Field Operations.

Both the regional office claims examiners and rating board specialists are often required to process 20 or more final actions daily. This means a person must

process more that {sic} two cases per hour. The number is left up to the management of each regional office.

In order to operate with reduced staffing, many regional offices no longer employ full time doctors for the rating board. Instead a part-time doctor is borrowed from a local medical center one to two times a week to sign his name to the accumulated rating decisions. He may spend one minute or less on each decision. This information can be confirmed by requesting the performance standards for regional office employees to include Claims Examiners, GS-9-11 and Rating Specialists GS-12. Information regarding regional office staffing in the adjudication division can be obtained from the Compensation and Pension Service at VA Central Office."

{EMPHASIS ADDED}

"DEEP THROAT" LETTER #2, RECEIVED BY MR. GORDON ERSPAMER, LEAD ATTORNEY IN NARS V. TURNAGE (CASE# C-83-1861-MHP), CONCERNING INTERROGATORIES SENT TO THE VETERANS ADMINISTRATION PURSUANT TO SAID ACTION. {NOTE: THIS LETTER PROVIDED BASIS FOR COURT INVESTIGATION RE DESTRUCTION OF DUE PROCESS DOCUMENTS REQUIRED UNDER COURT ORDER. SAID INVESTIGATION RESULTED IN FINES TO THE VA OF $120,000., REQUIRED COURT APPOINTMENT OF A SPECIAL MASTER TO ENSURE COMPLIANCE WITH FUTURE COURT ORDERS}

"July 11, 1986

"Gordon Erspamer, J.D.
NARS Advisory Board
78 El Camino Real
Berkeley, CA 94705

Dear Mr. Erspamer:

"Your interrogatories recently sent to the Veterans Administration have been received. You are heading in the right direction. However, there is a conspiracy by the supervisors of the Field Operations Staff in the Compensation and Pension Service to deny you the information requested. If you do not specifically name the correct form or record, they intend to indicate they have no record.

You should ask for specific error exceptions called. These are held for 2 years and are contained on form 20-6567a-21. A copy of the form along with a sample is enclosed. You should ask for any and all exception sheets that contain errors under the specific error codes your interrogarory {sic} requested. The SQC history file contains these exception sheets for all stations. The sheets

contain the name of the office, the name of the veteran and the claim number of the veteran. There is also a series of letters written to stations which document specific errors in due process and case control. You may wish to ask for all error sheets and letters concerning due process and case (claims) control for as far back as these errors have been kept.

Approximately 2 weeks ago, Michael Dunlap, the supervisor of Field Operations, ordered the consultants to purge the station files of derogatory information about the stations as well as the Adjudication Officers. Included in the purge was information received from San Francisco Regional Office employees about T.A. Verrill, Adjudication Officer of that office. The staff consultants of the Field Operations Staff purged the files. However, you may ask for station

visit reports and station history files. The periodic station analysis are held in the official station history files for 2 years and held indefinitely in the unofficial brown history file. You should request both station visit reports and staff analyses for 8 stations since January 1982 to present. These records along with SQC records are also maintained at each regional office.

It should be also noted that a legal consultant, Ronald Abrams, wrote several papers on due process problems found at field stations that have been given to the Director of Compensation and Pension Serivce {sic}, Gerald P. Moore. These should be requested. In addition, Ronald Abrams wrote a memorandum to Gerald Moore indicating a serious due process problem and Central Office failure to take the problem seriously. This memorandum was

destroyed by Michael Dunlap, the supervisor of the Field Operations Staff without being forwarded to the Director of the Service. Mr. Moore did indicate to a consultant, Mr. John Smith, who is now the Adjudication officer at the Hartford, CT Regional Office, that on the staff visit to Washington Regional Office, no due process problems should be identified.

You may wish to request the performance standards for each Adjudication Officer. You will note that there is no uniformity in the performance standards. This means that each office has its own quality standard. The Adjudication Officer is not responsible to any central authority, but to his own station director."

{EMPHASIS ADDED}

WASHINGTON POST NEWSPAPER ARTICLE CONCERNING VA HARASSMENT OF "DEEP THROAT", WRITTEN BY STAFF WRITER BILL McALLISTER, DATED APRIL 24, 1990

"Harassment Claim at VA Supported

"An internal Department of Veterans Affairs investigation has supported allegations that a VA supervisor harassed a worker who had warned a federal judge that department officials were destroying records in a highly sensitive lawsuit.

The finding by one of the department's Equal Employment Opportunity investigators is of the type that VA officials have said could trigger additional sanctions, such as contempt of court proceedings, for the department from U.S. District Judge Marilyn Hall Patel of San Francisco.

Three years ago, the judge levied a $120,000 fine for the wholesale destruction of records, needed in a lawsuit over the treatment of veterans exposed to radiation during atomic bomb tests. In addition, she warned VA officials not to harass any workers who had cooperated with the investigation of the records destruction. VA officials have told supervisors that "any adverse employment action" taken against a cooperating worker could subject the supervisor to contempt proceedings.

The fine and warning from Patel followed testimony by Barry S. Boskovich, a staff consultant in the VA's central office, who said that records in the case were being destroyed and that some VA officials were not cooperating fully with lawyers' requests for documents.

Boskovich has testified that his actions made him unpopular at the VA, and last September he complained to Equal Employment Opportunity officials there that his annual evaluation had been lowered by a supervisor in retaliation for his actions in the lawsuit.

EEO investigator Shed Robinson Jr. said in a report submitted in February to the department's compensation and pension service that Boskovich "established a prima facie case of discrimination." Robinson said it was likely that Ted Spindle, Boskovich's supervisor, had discriminated against Boskovich because of his testimony in the records case. He recommended a finding in favor of Boskovich.

Spindle denied retaliating against Boskovich, but he did tell the investigator that he kept a separate file

on Boskovich's work and that he believed Boskovich "was neglecting his duties as a result of his obsession" with the San Francisco case. Spindle declined to comment.

After receiving Robinson's report, VA officials ordered a second investigation. That report was completed last month, but it was inconclusive and basically told VA officials they would have to resolve the dispute.

Veterans Affairs Secretary Edward J. Derwinski described the Boskovich allegations as "a serious matter" in a letter to Congress earlier this year and promised he would investigate. His action came after the chairmen of the House and Senate veterans affairs committees and the House panel's ranking Democrat declared they "would be dismayed" if Boskovich was being harassed. The members of

Congress noted that Don L. Ivers, the VA's general counsel, had assured them there would be no retaliation against workers who testified about the destruction of records.

Don Smith, a VA spokesman, said yesterday it will be up to officials in Boskovich's section to attempt to resolve the matter. If Boskovich is unhappy with their offers, he can appeal the matter directly to Derwinski or to the Equal Employment Opportunity Commission for a hearing by an administrative law judge, Smith said.

As far as VA officials know, the matter has not been communicated to Judge Patel, the spokesman said.

The judge has yet to rule in the long-pending lawsuit involving veterans who were exposed to radiation during the tests." **{EMPHASIS ADDED}**

VETERANS ADMINISTRATION INTERNAL MEMORANDUM, WRITTEN BY RONALD B. ABRAMS, VA LEGAL CONSULTANT, CONCERNING DOCUMENTATION OF "DUE PROCESS" PROBLEMS, AND THE NARS V. WALTERS LAWSUIT (CASE # C-83-1861-MHP, PENDING, N.D. CALIFORNIA)

"VA VETERANS ADMINISTRATION

Date: 9/25/86

From: Ronald B. Abrams, Legal Consultant

Subj: Documentation of Due Process/NARS v.Walters/Analysis/Suggested Actions

To: Director, Compensation and Pension Service (21)

THRU: Assistant Director Adjudication Procedures

THRU: Chief, Project Staff

*****{NUMBERED PARAGRAPHS 1-13 OMITTED}

"14. Mr. Erspamer will try to prove that our adjudication process systematically denies procedural due process. He will argue that our system is unfair and counteractive. He will contend that our management evaluation system emphasizes productivity and timeliness to such an extent that our managers are encouraged to violate the due process rights of our claimants.

15. Mr. Erspamer can show that it is in the best interest of our managers to have their people do, as quickly as they can, as many cases as possible. He can also show that adjudication duties dealing with

the fairness of the adjudication process such as: control of claims, supervisory review of old claims, thorough development, recognition of all issues, providing adequate notice, documenting that notice was given, and careful quality review, tend to adversely affect gross productivity and timeliness statistics.

16. Because central office does not require its regional offices to validate their local quality review, Mr. Erspamer will contend that it is in the best interest of some of our managers to deny or ignore the due process rights of their claimants. He will argue that because due process procedures increase the time it takes to adjudicate a claim, thereby slowing production, it is not in the best financial interest of our managers to

follow our regulations and directives dealing with due process.

17. Mr. Erspamer can show that a managers' bonus and merit pay evaluation is based in part on the adjudication division's productivity. He will state that our system encourages some adjudication managers to report incorrect quality levels because they know that their failure to do this part of their job will not be held against them. If Mr. Erspamer can show that our system pits the financial interest of adjudication officers against the fair and reasonable treatment of our claimants, he would be well on his way to proving the VA does have an unfair, adversarial claims adjudication system.

18. Mr. Erspamer has obtained reports identifying regional offices that prematurely denied claims without notice so that credit for completed work could be taken (Baltimore). He has survey trip reports and white papers documenting that certain stations: ignored claims (Phoenix), established and cancelled controls improperly (Baltimore, Hartford, San Francisco, WRO), discouraged complete development (Baltimore), ignored or didn't emphasize documentation of due process and carelessly performed local quality review (many regional offices).

19. The way to win this case is to distance the Compensation and Pension service, The Department of Veterans Benefits and the Veterans Administration from the people who, to improve their performance evaluations, abused our claims

processing system and violated the rights of our claimants. I strongly suggest you, as Director of our Service, take appropriate administrative action against supervisors who, for whatever reason, encouraged or knowingly permitted the gross violation of the constitutional rights of claimants.

*****{NUMBERED PARAGRAPHS 20 AND 21 OMITTED} 22. We cannot defend the actions taken by some regional office and central office supervisors and win this case. Mr. Erspamer will present evidence tending to show the adjudication process is unreasonable and unfair. If we down play in Court, violations of VA rules by VA supervisors regarding the fairness of adjudication claims processing, the plaintiffs will prevail.

23. The due process clause assures reasonable procedural protections, applicable to the fair determination of the particular issues presented in a given case. (See Plato v. Roudebush 397F.Supp. 1295, (1975).) If the Court finds that our claims processing system is unfair, because VA managers are knowingly permitted to violate VA regulations and directives, I predict a majority of the Court will search for and find the "law" to overturn our statute.

24. The best approach would be to describe the improper actions as anomalies and aberrations. Explain that we in Central Office, under your direction, have been investigating these matters for a period of time. Although proving these improprieties was difficult and time consuming, we now have enough evidence to

act. (See paragraph 18 supra.) Argue that our internal actions show the inherent systemic fairness of the VA adjudication process.

*****{NUMBERED PARAGRAPH 25 OMITTED} "26. This memorandum is confidential. Because of its sensitive nature, I request that you not show this to anyone. I especially request that this memorandum not be seen by anyone in Section 214."

RONALD B. ABRAMS"

{EMPHASIS ADDED}

LETTER BY GAIL A. GOMPF, DIRECTOR, VA INTERGOVERNMENTAL AFFAIRS, TO NATIONAL VETERANS ORGANIZATIONS, ETC., DATED JUNE 5, 1986. LETTER APPEARS IN SENATE COMMITTEE ON VETERANS' AFFAIRS HEARING BOOK #100-938 CONCERNING S.11: JUDICIAL REVIEW LEGISLATION, DATED APRIL 28, 1988, PAGES 477 THROUGH 487. SUBMITTED INTO SAID HEARING RECORD AS EXHIBIT "G", BY PHILIP E. CUSHMAN, NATIONAL PRESIDENT, VETERANS DUE PROCESS, INC.

"Office of Congressional
and Intergovernmental
Affairs
Washington DC 20420

Veterans
Administration

June 5, 1986

Mr. Jon A. Mangis
Director
Department of Veterans Affairs
General Services Building
700 Summer Street, NE
Suite 150
Salem, Oregon 97310-1270

Dear Mr. Mangis:

"In accordance with our desire to maintain close cooperation and liaison with state offices and private agencies serving our nation's veteran community, I am enclosing copies of topical discussion papers recently released by the Veterans Administration which I think will be of immediate interest to you.

"Each of these papers address important issues concerning the continued delivery

of VA health care, benefits and other services to veterans in the future. The immediate items of discussion and interest are:

***** {ITEM #1 OMITTED} "2. Judicial Review: An overview of VA's Position." ***** {remainder of text of letter omitted}

"Sincerely,

GAIL A. GOMPF
Director
Intergovernmental Affairs"

{EXCERPT FROM PAGE 5 OF:} "OVERVIEW OF VA'S POSITION ON JUDICIAL REVIEW

"Moreover, many special considerations currently extended to veterans service

organizations may have to be curtailed. The providing of VA space and facilities {pursuant to 38 U.S.C. 3402}, **informal access to adjudicatory personnel**, etc., could be affected by judicial oversight and increased representation by private attorneys." ***** {BALANCE OF "OVERVIEW" OMITTED}

{EMPHASIS ADDED}

LETTER DATED MAY 10, 1988, FROM JAMES N. MAGILL, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES, TO SENATOR ALAN CRANSTON, CHAIRMAN, COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, WHEREIN MR. MAGILL RESPONDED TO WRITTEN COMMITTEE QUESTIONS. LETTER APPEARS ON PAGE 682-683, OF SENATE HEARING BOOK 100-938, DATED APRIL 28, 1988, CONCERNING S.11: JUDICIAL REVIEW LEGISLATION {VA}

"VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

MAY 10, 1988

The Honorable Alan Cranston

Chairman

Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed the Veterans of Foreign Wars response to questions submitted by you with respect to testimony given during the recent Senate Veterans' Affairs Committee hearing on April 28, 1988.

With best wishes and kind regards, I am

Sincerely yours,

JAMES N. MAGILL, Director
National Legislative Service

"QUESTION 1. A. **Do you have any concern that if judicial review legislation is enacted, your organization will**

lose the office space and telephones now provided to you free of charge by the V.A.?

"RESPONSE 1. A. **Yes**. As you know, Title 38 of the United States Code provides that the Administrator of the Veterans Administration may, at his descretion {sic} and, should space be available, provide office and telephone services to the major veteran organizations in conjuction {sic} with the adjudication of VA claims. We, of course, would prefer Congress to mandate this space because of the invaluable service rendered by the major veterans service organizations.*****

{***** REMAINDER OF QUESTIONS AND ANSWERS OMITTED}

TESTIMONY OF DR. ALCIDE D. PELLERIN, SALEM, VA., BEFORE THE UNITED STATES SENATE, COMMITTEE ON VETERANS' AFFAIRS, NINETY-FIFTH CONGRESS, CONCERNING SENATE BILL 364: VA ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW ACT, ON SEPTEMBER 21, 1977, PAGE 454. ALSO APPEARING IN SAID HEARING BOOK AT PAGE 468, IS DR. PELLERIN'S "OUTSTANDING {VA} PERFORMANCE RATING AND SUSTAINED SUPERIOR PERFORMANCE AWARD" {OMITTED}

"Dr. Pellerin. Mr. Chairman, honorable members of the committee. Thank you for giving me the opportunity to testify in this worthy cause. Please bear with me if I appear stage frightened, because I am. This is understandable in view of the fact that I have been waiting 31 year for this moment.

I am Alcide D. Pellerin, doctor of medicine, Boston University of Medicine, class of 1939. The pertinent aspect of my curriculum vitae consists in VA employ as a disability evaluation specialist for 4 years at the regional office level, and for approximately 4 years as associate member of the Board of Veterans' Appeals here in Washington.

In cases where veterans have succeeded in breaking the VA legal barrier, the illegal barrier would be more appropriate, and had their cases docketed in Federal court, the BVA decisions were reversed in every instance. There must be more to it than mere coincidence.

Since time does not permit presenting an expose of all that is wrong with the VA, which would require several hours if not several days, I shall limit myself to presenting one outstanding case

of injustice and abuse of power on the part of the BVA.

The case is that of Frank X, who in 1948 sustained a crushing injury to his lower extremities necessitating amputation. The surgical intern reported that the amputation was at the junction of the middle and upper third of the femur.

The VA promptly rated the disability 30 percent. some 20-odd years later an X-ray of the hip showed the amputation to have been 3 inches below the hip, which rated a 60-percent disability.

The VA gave him his due 60-percent disability from the date of the X-ray. Frank appealed, claiming 60 percent from the date of discharge. The Board of Veterans' Appeals upheld the denial. He asked for reconsideration, and a panel of two sections again denied.

Frank again was able to get a second reconsideration, this time by a panel of three sections of which one was my section.

During deliberations the BVA contended that it was not guilty of an error in the assignment of 30 percent after discharge, and therefore the veteran was not entitled to a retroactive 60 percent. I argued that Frank was not guilty either, and that he should not be penalized for an error by the VA physician.

I further argued that the issue was not one of guilt and that guilt should not be a basis for adjudication. I pointed out that the statutes do not say that only when the BVA is guilty of making an erroneous decision, are the benefits to be made retroactive, but they state that any time a decision is clearly and

unmistakably erroneous, retroactive benefits are in order.

I dissented, but eventually gave in under duress as in many other cases. Frank, wherever you are, please forgive me for having taken part in robbing you of $40,000 of $50,000 in due benefits.

Two wrong things stand out like sore thumbs in this case. One, the arbitrary and capricious interpretation of the law; two **the abuse of power by the chairman of the BVA in dictating and imposing his will on the board members.**

Since the BVA is the last word, the veteran has to grin and bear, and regret that he hadn't defected or deserted.

During the next few minutes I would like to give you examples of some of the dirty tricks used by some VA personnel to

achieve the VA objective of denying claims. One is a case, a diagnosis of "athlete's foot" was made during an official exam. That was not to the liking of the reviewing chief who, I assume, wanted to serve his master well and at the same time feather his bed.

So he eradicated the diagnosis and created his very own diagnosis, "athlete's foot not found." The denial of the claim was sustained by the BVA. This, I can assure you, would never be allowed to happen in a court of law.

Two, in getting an independent medical expert opinion, the BVA typically utilizes a medical school staff member who is also on the staff of the VA hospital associated with the medical school, who is on some sort of a salary by the VA, and who according to my research had been a

regular VA employee for several years at some time or other in the past.

This "setup" inevitably constitutes conflict of interest, yet the medical expert's word is on "a par" with the divine word of God. In contrast, should the veteran submit an opinion from a board certified specialist, say from some institution like the Mayo or Lahey Clinic, the Arthritis Foundation or the Georgetown Medical Center, that opinion only serves to reopen his case, and is considered trash by the VA.

Not only does a court of law ban conflict of interest, it encourages the challenging and questioning of the expertise of an expert, which is the lifeblood of the legal system. One last case: When the so-called VA independent medical expert was confronted with a finding, in the service medical record,

that was favorable to the veteran, he defied the rule of evidence and ruled that the military doctors had made an erroneous finding.

Based on that medical expert's opinion, the BVA issued a denial; again in a court of law the BVA decision would surely be reversed.

In summary, the basic problem is one of uncontrolled, unchecked, incorrectable injustice to the veteran because of the dictatorial power of the BVA. This runs counter to our great American ideal of democracy, which abhors and denounces dictatorship, and to the Constitution, which guarantees justice in a court of law for every citizen.

Please, gentlemen, I beg you, make it possible for the veteran to get justice, and the only possible way to accomplish this is not in the VA kangaroo

courts but in the Federal courts, which should be open to the veteran, as to the nonveteran.

It is my understanding that even aliens now have access to the courts, If the veteran is not more deserving then he is at least as deserving as the nonveteran citizen or the noncitizen.

Senate bill 364 would take the VA out of its lofty ivory tower and bring it down into the realm of justice and fair play for the veteran.

I wish to thank you gentlemen for your patience and attention and hopefully for your understanding of the plight of the veteran.

Chairman Cranston. Thank you very much, Doctor."

{EMPHASIS ADDED}

EXCERPT FROM CONGRESSIONAL BUDGET OFFICE (CBO) "COST ESTIMATES", PROJECTING THE COSTS FROM ENACTMENT OF SENATE BILL 349: "VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT". SAID ESTIMATES APPROVED BY JAMES L. BLUM, ASSISTANT DIRECTOR FOR CBO BUDGET ANALYSIS DIVISION, APPEAR IN SENATE REPORT NO. 97-467, DATED JUNE 8, 1982, AT PAGES 56 THROUGH 61.

*****{PAGE 60} "It was assumed, based on a BVA estimate, that the rate at which cases are denied by BVA will drop from its present level of 70 percent to about 60 percent with the use of independent medical opinions (as authorized by section 108) and precedent decisions."

*****{PAGE 61 OF REPORT} "The VA estimate of the increase in the workload of the General Counsel's office assumes a denial rate in BVA decisions of 72 percent. BVA asserts, however, that the current denial rate is 70 percent and would decrease to 60 percent under the provisions of S.349. The lower denial rate will result in a lower number of appeals and, therefore, a smaller increase in the workload of the General Counsel's staff."

{EMPHASIS ADDED}

HANDWRITTEN LETTER BY T.A. VERRILL, ADJUDICATION OFFICER, VETERANS ADMINISTRATION SAN FRANCISCO REGIONAL OFFICE.

"Section Chiefs

"Although **VAR 1103** **permits a hearing anytime on any issue, we do not have the resources to operate in this way**. Hearings should **follow** the statement of the case. Hearings are not to be scheduled before the SOC in all but the most unusual cases. **We can always explain why a hearing is not appropriate** at a particular stage in processing. In cases previously disallowed, the hearing process must be discouraged as a means of presenting new and material evidence. Personal history can be presented on VAF 21-4138 or

affidavits. Recitation of facts already of record or new facts not tying the issue to service, e.g. a description of present symptoms, will not help the case. **I know you are aware of these points, but the appellant isn't.**

To effect this change in policy, employees will obtain the initial of a Section Chief on all requests to 21 to schedule a hearing.

T.A. Verrill

ADJ. OFF."

{Emphasis added}

PORTION OF "REPORT" NO. 100-418 OF THE COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, DATED JULY 7, 1988, CONCERNING S.11: VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT. PORTION QUOTED APPEARS AT PAGE 45 OF REPORT.

"5. HEARINGS BEFORE TRAVEL BOARD SECTIONS"

"As discussed earlier under the heading "Shady Methods to Speed Claims Resolution," one of the drawbacks to the BVA being situated in one location -- in Washington, D.C.--is the lack of ability on the part of many veterans to attend personal hearings before the Board. This is particularly the case because of the BVA statistics showing that allowances are statistically far more frequent after

personal appearances before the Board in Washington (19.5% in FY 87) and after appearances before a traveling section (30.6% in FY 87). In a general effort to permit an opportunity for more personalized appearances to those who are unable to travel to Washington, D.C., the BVA utilizes two alternative methods. Under the first, the BVA authorizes VA Regional Office adjudication personnel to act as agents for the BVA and, in that capacity, to conduct appellate hearings at Regional offices. The transcripts of these hearings are then sent to the BVA for a decision by a Board panel. Although this does not provide an opportunity for a hearing, the Committee is concerned that it is clearly an inadequate substitute for having the decisionmakers see and hear the claimant and other witnesses. In response to questions from the Chairman, the BVA

Chairman testified at the June 16 hearing that there is no method for transmitting to the BVA any information about the hearing personnel's assessments of the credibility of the claimant or other witnesses.

The second alternative involves a BVA Section traveling to various Regional Offices and holding personal hearings for a certain number of days. Due to the limitation on resources, there are a limited number of travel Board hearings available. In FY 1987, 739 such hearings were held. At the Committee's hearing, the BVA Chairman testified that because of the limited number of such traveling Section hearings, the BVA did not routinely tell claimants about this option. Specifically, Mr. Eaton noted, "If you advertise that too much, you are

going to get more than you can handle". In this regard, the Committee notes that the form filled out by claimants to request an appeal to the BVA (Form 1-9) presents only two options to the claimant: One for a field hearing before Regional office personnel, as discussed above, and one for a hearing in Washington, D.C. There is no option presented for selecting a hearing before a traveling Board Section. According to Mr. Eaton, the traveling Board hearings are scheduled by giving veterans' service organizations a certain number of hearings, and allowing the service officers to designate who receives a hearing. When asked at the Committee's hearing why the veterans service organizations find it desirable to have hearings before the traveling Board Sections, Mr. Eaton replied:

"It is always better in any case to have a personal hearing before the people who are deciding. There are exceptions to that; but generally, if you have a good case and you have a witness who is at all credible, you are better off facing those Board members and telling them all about it. Those are the facts of life.

Not only are travel board allowances higher, but personal hearings in Washington are higher -- not as high as travel board -- but there is not as much selection in the Washington office as in the travel boards. But they do pick and choose.

They are only allowed a few cases on the travel board for each service organization. They can only have so many because there is only so much time available for the travel board to

hear those cases. So, they pick the best cases."

"When asked if there is a **quota**, Mr. Eaton replied, "In effect. It has to be that way."

The Committee believes strongly that this method of allocating hearings before traveling Board sections is contrary to the accepted notions of evenhandness, fairness, and justice in that every individual should have an **equal opportunity** to obtain the most beneficial process. Accordingly, the Committee bill contains a number of changes to the current scheme regarding notice about allocation of traveling Board hearings.***** {LAST PARAGRAPH OMITTED} {EMPHASIS ADDED}

"LETTER TO THE EDITOR" OF THE WASHINGTON POST, DATED JULY 1, 1986, WRITTEN BY 4 MEMBERS OF CONGRESS, REVEALING THAT VETERANS ARE DENIED EQUAL PROTECTION OF THE LAW, BY NOT BEING ALLOWED TO SUE THE VA, BUT THE VA IS SUING LARGE NUMBERS OF VETERANS. LETTER ALSO REVEALED THE VA BLACKMAIL OF THE VETERANS ORGANIZATIONS WHICH PROVIDE FREE REPRESENTATION TO VETERANS CONCERNING THEIR CLAIMS AGAINST THE VA, BY THREATENED SAID ORGANIZATIONS THAT THEIR "FREE OFFICE SPACE . . . TELEPHONE SERVICE . . . " ETC., BENEFITS, PROVIDED TO THEM NATIONALLY BY THE VA, "MAY HAVE TO BE CURTAILED/COULD BE AFFECTED" BY PASSAGE OF JUDICIAL REVIEW LEGISLATION.

"CONGRESS OF THE UNITED STATES

House of Representatives

Washington, DC 20515

July 1, 1986

Letter to the Editor
The Washington Post
1150 15th Street, NW
Washington, DC 20071

Dear Editor:

"Some opponents have taken issue with your support of H.R. 585, a bill to authorize court review of VA decisions and to allow veterans the right to counsel of their choice. As sponsors of the bill, permit us to address just a couple of points.

It is laudable that "as a matter of principle, the VA doesn't view itself as a prospective litigant with the veteran."

Unfortunately, that statement doesn't square with reality. In the past four years alone, the **VA has filed suit against more than 140,000 veterans**, for alleged benefit overpayments that average $570.

While litigating against these veterans, the VA says that the court can't even listen to the veteran's defense, arguing that current law precludes judicial review of any decision of law, regulation, or fact made by the VA.

Further, the VA's commitment to an "informal and cooperative system" must be called into question when the VA tells veterans' organizations that passage of judicial review legislation **will result in the loss of the free office space, furniture, and telephone service** [pursuant to 38 U.S.C. §3402 (a)(2)]

presently provided to these groups in VA regional offices." {*****Balance of letter omitted}

Sincerely,

DON EDWARDS
Ranking Majority Member
Veterans Affairs Committee

LANE EVANS
Chair, Vietnam-Era Veterans in Congress

THOMAS A. DASCHLE, Chairman
Subcommittee on Education, Training, and Employment, Veterans Affairs Committee

BOB EDGAR, Chairman
Subcommittee on Hospitals and Health Care, Veterans Affairs Committee"
{EMPHASIS ADDED}

STATEMENT OF KENNETH T. BLAYLOCK, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AT A HEARING BEFORE THE SUBCOMMITTEE ON SPECIAL INVESTIGATIONS OF THE COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES HOUSE OF REPRESENTATIVES, NINETY-SIXTH CONGRESS, SECOND SESSION, CONCERNING JUDICIAL REVIEW OF VETERANS CLAIMS, NOVEMBER 19, 1979. PAGE 330 OF HEARING BOOK.

"The American Federation of Government Employees, AFL-CIO, is pleased to have the opportunity to submit its views concerning legislation (H.R. 6181) providing, among other things, judicial review of certain final decisions of the Administrator of Veterans Affairs. AFGE represents over 700,000 personnel

throughout the federal government. **Within the Veterans Administration itself, AFGE holds some 248 exclusive units of recognition representing nearly 116,000 personnel**, including personnel in the Board of Veterans Appeals in the VA central office in Washington, D.C.

Yet we must also observe that **among our membership considerable dissatisfaction exists** concerning the lack of access to the courts on the part of veterans who wish to appeal final determinations concerning benefit and disability decisions made by the Veterans Administration. In effect, under current law, **veterans have been relegated to the status of second-class citizens** who are denied the same rights of judicial review available to most other

beneficiaries of federal entitlement programs.

In this regard, we note that **a demonstrated need exists for the Veterans Administration to be subject to judicial accountability**. We have seen figures which clearly indicate that the veteran making an appeal to the Bureau of Veterans Affairs (BVA) is **under a serious disadvantage**. Whereas appeals to the **Social Security** Administration are decided in favor of the claimant in **two out of three cases**, actual results support or favor the veterans claim in the BVA in only **one out of ten cases**.

AFGE recognizes that exact comparisons between these very different programs are difficult to make, but **it appears to us as though large numbers of veterans have not received the benefit of reasonable doubt on any**

consistent basis. The informality of the Veterans Administrations appeals procedure, combined with the absence of precedence in the disposition of cases, leaves wide discretion for inconsistent and uncontrolled decision making by the regional offices. In the absence of court review, there is no effective institutional check on arbitrary or impermissible action.

We do not mean to imply, however, that the dedicated career personnel in the Veterans Administration who are involved in the review process are not faithfully executing their duty to veterans and to the public. In fact, considering the budget squeeze on the agency over the past few years such personnel have done much to uphold the integrity of the review process. The Office of Management and

Budget has brought substantial pressure against government agencies to control outlays, and such pressure **can easily translate** into tougher guidelines and policies concerning various entitlement and spending programs, particularly **when such policies are not subject to any outside review**. The Veterans Administration, for example, has made several contracting-out decisions in recent years which we believe cannot be justified on grounds of cost-effectiveness or government efficiency and which have harmed the delivery of services to patients in the hospital system. In such instances, considerations of false economy have been placed above the needs of federal workers, taxpayers and the public.

Finally, we would also like to point out that in view of the numerous outstanding problems faced by today's

veterans, particularly by those who fought in Southeast Asia, it is imperative they feel they have received the benefit of full due process from the federal government. There has been much recent public concern about the plight of the "forgotten veterans." We believe that passage of legislation providing judicial review in the claims process will show Congress still cares."

{Emphasis added}

LETTER FROM NORMAN J. JOHNSON TO HON. ALAN CRANSTON, CHAIRMAN, COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, DATED OCTOBER 11, 1977, AS SAID LETTER APPEARS ON PAGE 786 IN SENATE HEARING BOOK CONCERNING SENATE BILL 364: "VA ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW ACT", NINETY-FIFTH CONGRESS, FIRST SESSION.

"STATE OF CONNECTICUT

DEPARTMENT ON AGING

90 WASHINGTON ST.

HARTFORD, CONNECTICUT 06115

Tel. 566-7725

WILLIAM R. RATCHFORD

Commissioner

October 11, 1977

"Honorable Alan Cranston, Chairman

United States Senate

Committee on Veterans' Affairs

Washington, D.C. 20510

Dear Senator Cranston:

"I was scheduled to testify on S. 364 last month but I could not make the personal arrangements necessary to do so. Similarly, I have not found the time to prepare elaborate written testimony. I do, however, have insights into the workings of the Board of Veterans' Appeals which I want to share with you and the members of the Committee.

I was a "staff legal advisor" to the Board of Veterans' Appeals for nine months in 1971-72. The "staff legal advisors" are the attorneys who actually write the Board's decisions, subject to review and ultimate approval of an appellate panel of two lawyers and one physician. I had previously practiced law for two years and the first thing I had to learn at the B.V.A. was to shelve my notions of professional objectivity and procedural due process.

Early on, I learned that there was a covert quota system in effect. Job performances of staff attorneys were rated by the number of decisions written in a given week. The fact of this quota system was always denied by the panel members and the front office; it was a well known fact to the staff attorneys. Each week a tally was circulated to all personnel showing the number of decisions produced by each attorney and the total for each of the dozen or more sections of the Board. There was clearly a competitiveness between sections and among the attorneys in any given section. One was expected to produce a minimum of six decisions a week and I was once cautioned by a panel member not to exceed one dozen per week so as not to drive up management expectations. I cannot believe that justice is accorded its due when the decision process is managed in such a way.

Inconsistency of decisions is a major shortcoming of the Board and its processes. A case might well be decided on unwritten principles peculiar to one section and originating in the isolated perspective of the panel chairman. (For example, my section would allow service connected status for the ear condition of tinnitus if it accompanied another ear disorder for which service connection was or could be established. Another appellate panel usually denied tinnitus claims when a veteran already had service connected status for an ear disorder. My panel's reasoning was that since tinnitus is a subjective condition, the existence of other ear disorders was the best evidence of it; otherwise tinnitus could not be established to exist. The other panel's reasoning, as explained to me, was that if a veteran was "service connected"

for one ear condition he was already getting his due.)

Discussions with other staff attorneys indicated that our respective panels interpreted statutes, regulations and precedent in haphazard patterns and dogmatically applied their peculiar unwritten formulas to the cases at hand. The fact that decisions were written by lawyers seemed more a function of bolstering the legitimacy of the process rather than one of actually conducting professional inquiries into the facts and applicable law of the cases.

Because cases were decided on differing grounds, and for reasons not contemplated by the laws and regulations, case decisions were haphazard, unfair and probably illegal. To be specific, in my section there was a practice of absolutely denying claims for service connections where the service departments could not

produce any medical records. This was not an infrequent problem, and surely many valid claims were refused on these grounds. To cover the situation and the embarrassment of the loss of the records, the opinion would recite something to the effect: "Service medical records do not indicate treatment for the claimed injury." Such evasion was common in cases where there were no records.

Another disturbing aspect of the appeals process and its freedom from outside review was the tendency to review a veteran's service records for indications of worthiness. A number of proffered decisions were reversed by the section because the facts were not overwhelming and the veterans' records showed infractions of military discipline, even minor ones. Again, the biases and individual standards of panel members

affected the decision - and they would differ from one section to the next.

On questions of permanent and total disability claims, my section was very tight. Where the facts were close, the decision always went against the veteran, although the statutes mandate a liberal interpretation. In one particular case I took an advocate's position because I was convinced of the merits of the veteran's disability claim. I urged consideration of the fact that the Social Security Administration had made a determination of disability. One of the section members dismissed that argument with the comment, "Those liberal b-----ds would give away the treasury." (My own previous experiences with Social Security disability claims had led me to the opposite conclusion.)

These experiences and criticisms may seem minor but I believe they illustrate

the dangers of the present closed review scheme of veterans' claims. Veterans deserve equal and fair treatment and they will not get it until the current scheme is opened to the review of an independent judicial process.

I want to leave you with one final example of B.V.A. attitudes: I once drafted and dictated an appeals decision granting service connection status for a black, Korean action veteran. The elements of the case were clear - His induction physical examination report indicated normal feet. The separation physical indicated "pes planus" or flat feet, not an unusual development over the course of Army service and one that can be painful and limiting for all of the jokes that are made of it. The facts and the law were clear, but the decision was returned to me with instructions to deny the claim.

I found it difficult to evade the letter of the law and I considered it dishonest to arbitrarily deny the facts in order to reach the decision my supervisor desired. I asked the section chairman why the decision was to be a denial. He explained that it was because the veteran was black and all black people eventually get flat feet. It was a "racial characteristic!" I now wonder how many decisions were written or decided by that man in his thirty-odd years with the Board of Veterans' Appeals?"

Sincerely yours,

Norman J. Johnson"

{Emphasis added}

STATEMENT OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS, AS A WITNESS AT A HEARING ON NOVEMBER 19, 1980, BEFORE THE SUBCOMMITTEE ON SPECIAL INVESTIGATIONS, OF THE COMMITTEE ON VETERANS' AFFAIRS, U.S. HOUSE OF REPRESENTATIVES, NINETY-SIXTH CONGRESS, SECOND SESSION, CONCERNING JUDICIAL REVIEW OF VETERANS' CLAIMS

"I will summarize a portion of my statement with the understanding it will be published in the record in full.

As this committee is aware, for more than 30 years the VFW has agonized with the judicial review problem. For a number of years we opposed judicial review by resolution, not always with unanimity but always by majority vote.

At our 80th national convention held in Dallas, Tex., in August 1979, our position changed in that the voting delegates rejected a resolution opposing judicial review and accepted a resolution after much debate and rewrite of the resolution to support judicial review.

In the legislation to provide judicial review of veterans' administrative claims decisions pertaining to matters of law and regulation, insofar as the merits of the claim are concerned, and review of the facts that are alleged to be arbitrary and/or capricious. Identical language is contained in our now current Resolution 680 passed by the voting delegates to our 81st national convention held in Chicago this past August.

You may wonder, Mr. Chairman, and rightly so after so many years, the

Veterans of Foreign Wars changed its position with respect to judicial review, and the following reasons are offered:

1. There are those who believe a system which permits welfare or supplemental security income recipients to seek court relief but denies the same forum to veterans is flawed.

2. Many Vietnam veterans are aware that the Veterans' Administration, in concert with the President's Office of Management and Budget, attempted in 1973 to rewrite the rating schedule to their advantage, believe the VA has been insensitive to their needs and are disenchanted believing that they have not received timely, full, fair, and impartial consideration of their appeals.

Claims of older veterans are often viewed with a jaundiced eye simply because they deferred filing. In the absence of

substantiating service medical records "buddy statements" by former prisoners of war and other knowledgeable witnesses are nearly always discounted as having been made from remote memory.

3. One of the most frequently heard complaints by our national officers in their travels is the complete frustration of those whose claims have been denied and due to the finality statute of 38 U.S.C. 211(a) are foreclosed from redress through court action.

4. Many service officers are increasingly disappointed in the denial of cases which they believe have considerable merit. Also, they wonder why, over the past 8 years, the percentage of cases allowed by the Board of Veterans' Appeals has fluctuated only a little over 2 percent whether that body considered 25,000 cases in the year or more than

35,000 cases. The average allowances have been 12.8 percent of cases considered. In the last 4 fiscal years, the variance has been only two-tenths of 1 percent in that allowances in 1976, 1977, and 1979 were 12.7 percent and in 1978, 12.5 percent, in 1980, 12.4 percent.

Restrictive language first surfaced some 93 years ago with passage of the Tucker Act in 1887 now encoded as 28 U.S.C. 1346(d). Note 536 of the annotation to this citation clearly reflects Congress' intention to prevent court review of pension claims.

Coupled with the foregoing and lending credence to administrative finality has been the historically held position of Congress and the courts that veterans' benefits are gratuities and not a right. President Eisenhower appointed

the Bradley Commission under Executive Order 10588.

You will recall that the Bradley Commission declared that military services is an obligation of citizenship and that veterans are not entitled to any more consideration than nonveterans. Thus the Commission joined the vociferous minority opposed to special consideration for veterans and provided a Roman holiday for an unfriendly press which applauded the courage of General Bradley and the Commission and proclaimed that at long last special consideration for veterans would be tossed out the window.

Thanks to the wisdom of Congress, this did not happen. In the Commission's report, the following language is set forth:

> The gratitude of the Nation to those who have served it in time of war is

> fundamental in the whole concept of American veterans' benefits.This tends to place benefits in the category of a gratuity to which the recipient (the veteran) has no legal 'right', and which the giver (the government) has a legal right to withhold.

Mr. Chairman, while Veterans' Administration claimants' access to the Federal courts has been foreclosed, potential recipients of other Federal benefit programs took advantage of court decisions to elevate the status of their benefits from mere gratuities to the level of statutory entitlements with vested property interest.

This trend, which commenced in the 1960's. culminated in the landmark case of Goldberg v. Kelly, 397 U.S. 254 (1970), wherein the Supreme Court concluded that welfare benefits are matters of statutory

entitlements, more likely property interests than gratuities.

Mr. Chairman, it is a strange lesson in logic, indeed, that welfare recipients and those in the supplemental security income program enjoy the right to judicial review while our veterans, their dependents, and survivors are foreclosed from this same avenue.

If welfare benefits are not gratuities, the word has lost its meaning. Surely veterans' benefits are not gratuities notwithstanding repeated rhetoric to the contrary. No veteran has ever received anything for nothing. At the very least, those who have served honorably in uniform during periods of war and hostility have given years from their lives, their families, and their personal endeavors, if not their mental or physical health or their very lives.

This concludes my summary, and I will be happy to answer any questions you may have.

Mr. Leach. Thank you, Mr. Schwab. That was a very stimulating presentation." {Emphasis added}

EXCERPT CONCERNING "EQUAL PROTECTION" FROM PREPARED STATEMENT OF SIDNEY COOPER, NATIONAL LEGISLATIVE DIRECTOR, VETERANS DUE PROCESS, INC., BEFORE THE COMMITTEE ON VETERANS' AFFAIRS, HOUSE OF REPRESENTATIVES, ONE-HUNDREDTH CONGRESS, SECOND SESSION, ON SEPTEMBER 8, 1988, CONCERNING "JUDICIAL REVIEW OF VETERANS' AFFAIRS", HEARING BOOK SERIAL NO. 100-60, PAGE 412-445, FOLLOWING EXCERPT AT PAGE 439.

"Is Mississippi, the Promised Land of Veterans Benefits?

Inexplicably, the chance of obtaining service connected V.A. pensions in Mississippi and Arkansas appears to be twice as great as anywhere else in the U.S. Further, the average pensions granted

there are considerably higher too - 30% greater in Mississippi; 43% greater in Arkansas.

Non-service connected disabilities likewise fare extremely well: 2.3 X the national average in Mississippi; 1.9 X in Arkansas. Incredibly, there are 72% as many Non-Service connected claims in Mississippi as there are Service connected claims; in Arkansas, 60%. The national average is only 31% which means that Mississippians are either sicker or smarter than everyone else.

What explanation can there be for this blatant favoritism? Deference paid to veterans residing in Mississippi and Arkansas should come as no surprise to students of the V.A. and the House Veterans Affairs Committee (HVAC). Cong. G.V. Montgomery (D.Miss.) is the chairman of the HVAC while John Hammerschmidt (R.

Ark) was its ranking Republican member. Seniority and power obviously have an impact on what veterans receive and from which state.

How could such blatant favoritism take place without arousing the ire of the country? The awful truth is, that no one is watching the V.A. or analyzing its operations. Not the Congress; not the Press; not the Courts - not the States - not the NVSO's - not anyone!

Apparently, based upon the benefits dispensed in 1985, States such as California are being short changed $310 million, per year; Illinois, $204 million; Indiana, $70 million, whereas Mississippi and Arkansas are riding the "gravy train". No satisfactory explanation has been offered to explain such large pension descrepancies.

Mississippi has provided the armed forces with the lowest number of service men (92.1 per thousand) whereas the national average is 118.2 per thousand of population. Yet they receive more claims and higher per capita benefits. No wonder Cong. G.V. Montgomery says the system ain't broke! It does all right for Mississippi and Arkansas.

Accordingly, based upon the 1985 VA numbers, Mississippi is last in war but first in the hearts of the VA.

(Note: All numbers and relationships developed therefrom were extrapolations derived from the V.A. Fiscal Year, 1985 reports furnished the Congress)."

{EMPHASIS ADDED}

LETTER FROM KENNETH E. EATON, CHAIRMAN, BOARD OF VETERANS APPEALS (BVA), TO UNITED STATES SENATOR GARY HART, DATED JUNE 30, 1982, INDICATING AN 11.3% ALLOWANCE RATE IN APPEALS THAT REACHED THE BVA DURING THE 30 YEAR PERIOD 1952 THROUGH 1981, AND A 12.9% BVA ALLOWANCE RATE DURING THE 12 YEAR PERIOD, 1970 THROUGH 1981.

"Board of Veterans Appeals
Washington, D.C. 20420

"Veterans
Administration

June 30 1982

Honorable Gary Hart
United States Senate
Washington, DC

Dear Senator Hart:

"Your letter of June 11, 1982, was referred to the Board of Veterans Appeals (BVA) for an answer to the second question regarding cases appealed to the Veterans Administration.

We do not have complete statistics for 30 years. The best information we have:

- Appeals that reached the Board of Veterans Appeals - FY 1952-1981 (30 years):

  BVA decisions.....989,303

  Allowed by BVA.....111,338

- Appellate actions - FY 1970-1981 (12 years):

  Appeals initiated (Notices of Disagreement filed) 670,977

  Allowed in field offices.....111,401

  BVA decisions.....363,746

Allowed by BVA.....47,044

Allowed in field

offices following

Remand by BVA.....11,736

Combined allowances....170,181

I hope this information will be helpful.

Sincerely yours,

KENNETH E. EATON

Chairman"

{ON THIS PAGE, WOULD HAVE APPEARED A SINGLE PAGE OF VITAL BOARD OF VETERANS APPEALS STATISTICS (I.E. ALLOWANCE RATES, ETC.), SUMMARIZING A 10 (TEN) YEAR PERIOD. UNFORTUNATELY, SUPREME COURT FORMATTING RULES NECESSITATED 10 (TEN) PAGES TO SET FORTH THE IDENTICAL INFORMATION. CONSEQUENTLY, THE RESULTING PRESENTATION DEPARTED FROM THE BREVITY AND CLEARNESS CONTEMPLATED BY SUPREME COURT RULES, AND, ACCORDINGLY, IS OMITTED. SAID STATISTICS AVAILABLE UPON REQUEST}

EXCERPTS FROM WASHINGTON POST NEWSPAPER ARTICLE, BY STAFF WRITER BILL McALLISTER, DATED FEBRUARY 8, 1990, ENTITLED "THE FIRST FOOTPRINTS IN THE SAND --- NEW VETERANS' CLAIMS APPEAL COURT HOLDS INITIAL SESSION"

*****{PARAGRAPH 2} "It took years of debate and an act of Congress, but a new federal court-the first federal judiciary body to be created in 30 years-held its initial meeting yesterday to hear the claims of the nation's aggrieved veterans."

*****{PARAGRAPH 15} "The court located its offices at 1625 K Street NW, two blocks from the VA's central office and Nebeker {Chief Judge} has made clear that he wants a sharp line drawn between his court and the VA. When veterans ask about the

relationship, the judge said he responds, **"We do give them [the VA] preference, but we do correct their papers."**

{Emphasis added}

"INFORMAL GRIEVANCE", DATED MAY 11, 1987, FILED WITH THE CHAIRMAN OF THE BOARD OF VETERANS APPEALS (BVA), AND SIGNED BY SEVERAL INDIVIDUALS AT THE BVA. SAID GRIEVANCE WAS SUBMITTED AS AS A PART OF EXHIBIT "J" TO THE PREPARED STATEMENT OF RICHARD E. O'DELL, VICE PRESIDENT, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, AT A HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, ONE HUNDREDTH CONGRESS, SECOND SESSION. SAID VVA TESTIMONY APPEARS BETWEEN PAGES 95 AND 195 OF THE CONGRESSIONAL HEARING BOOK. EXHIBIT "J" WHICH, IN PART, APPEARS BELOW, IS ON PAGES 141 THROUGH 144.

"MAY 11, 1987

INFORMAL GRIEVANCE

"The undersigned, Members of the Board of Veterans Appeals, both individually and jointly, hereby present an informal Grievance against the Chairman of the Board of Veterans Appeals based upon a policy of awarding bonuses to various Board Members depending on the number of decisions produced in their individual sections.

Instead of providing a fair and impartial system of handling the number of appeals, the Chairman is engaging in acts, practices, policies and courses of conduct to pressure Board Members and Sections into increasing the number of cases being processed each year without regard to the amount of time that must be devoted to

each individual case in order to give it adequate legal and evidentiary consideration and in order to render a careful, correct, fair and impartial written decision consistent with the Members' obligation to treat each claimant in accordance with the requirements of due process.

*****{PARAGRAPH #5} "The current system rewards carelessness but penalizes diligence. Obviously, a section that produces the quota of 40 decisions per week spends at least one hour of time for each case. A number of sections have found that proper processing of this amount cannot be done and have fallen behind the weekly quota. On the other hand, for example, a section that produces 80 cases per week spends on the average only one half an hour on each case. It is

obvious that a one half hour review cannot be as complete as a one hour review. It is also apparent that the high producing section is rewarded for doing less work on each case. The record will show that on a number of occasions in the past, certain sections have processed more than 80 cases in a single week. We dispute any contention that under these circumstances, each case was given a thoughtful and thorough review by each Board Member.

*****{PARAGRAPH #7} "Another, and perhaps the most serious manipulative method of exploiting the current system is by obtaining signatures on decisions by Board Members (or Acting Board Members) who sign the decisions despite not having reviewed the case. This so-called "courtesy" system not only deprives our claimants from a review to which they would

otherwise be entitled, but is also used to artificially increase the production of decisions. We need not identify those sections that regularly engage in this practice because their identity is well known to the Deputy Vice Chairmen who review their decisions.

*****{PARAGRAPH #9} "With regard to the same system of "courtesies", any section member can give an "in house courtesy" signature, thereby accomplishing the same result as obtaining a "courtesy" signature outside the section. All that is required are cooperative Board Members who are mainly motivated by monetary awards rather than concern for proper adjudication of claims."

The undersigned are of the opinion that the pressures to meet goals or quotas (or

even to increase allowance rates) are illegal. In the case of Association of Administrative Law Judges, Inc., v. Heckler, 594 Fed Supp 1132, decided September 10, 1984, the Court observed that the Administrative Procedures Act contained a number of provisions to safeguard the decisional independence of ALJ's. They are exempted from performance appraisals to which other Civil Service employees are subject. ALJ's do not receive monetary awards or periodic step increases based on performance. (Emphasis supplied). Cases must be assigned, whenever possible, in rotation. (In that case, the Social Security Administration was pressuring the ALJ's because of excessive allowances.

*****{PARAGRAPH 16} "In summary, the undersigned, both individually and

jointly, are aggrieved by the system used by the Chairman to either grant or withhold monetary awards based on the number of decisions produced during the counting period. The grievance is based on the fact that the award system cannot be administered in a fair and impartial manner and the fact that the system is subject to abuse and manipulation of certain sections. The system penalizes those individuals who do more work, i.e., spend more time reviewing each case and rewards those who do less work on each case and who subvert the established review process by eliminating at least one review. With regard to the entire grievance procedure, the undersigned will exhaust all of its administrative remedies prior to taking any other action."

{EMPHASIS ADDED}

EXCERPT {PAGES 238 AND 239 OF HEARING BOOK} FROM THE STATEMENT OF ROBERT O. MULLER, PRESIDENT, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED JUNE 4, 1986, BEFORE THE HOUSE OF REPRESENTATIVES, COMMITTEE ON VETERANS AFFAIRS, CONCERNING H.R. 585: "JUDICIAL REVIEW OF VETERANS CLAIMS", NINETY-NINTH CONGRESS, SECOND SESSION. HEARING BOOK SERIAL NUMBER 99-52, VOLUME 1, PAGES 230 THROUGH 279.

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{Hearing Book page 238} 1. "VA Errors

Although the need for judicial review does not hinge on VA errors, it is beyond dispute that the VA sometimes makes erroneous decisions. Recent oversight hearings of the BVA makes this clear. For example, the following exchange took place

during these hearings between Congressman Applegate and Kenneth Eaton, Chairman of the Board of Veterans Appeals:

Mr. Applegate:

> Later on we will be receiving a comment from a witness about allowance rates from the various sections of the [BVA], and that perhaps some panels have consistently lower allowance rates than others . . . . Have you observed this and, if you have, do you have any comments about it.

Mr. Eaton:

> **Yes**, indeed, it is quite true that there is what I might say is a **significant variance between**

different sections of the Board and how they see these cases

. . . There are a couple of sections, or Board members, I suppose, who are rather low in their allowances. But, you know, you can't tell them what to do. . . .

Mr. Applegate:

You can have equal cases, identical, where one will get more than the others.

Mr. Eaton:

I'm afraid so.[2]

[2] Oversight Hearing on the Operation of the Board of Veterans Appeals: Hearing before the Subcommittee on Compensation, Pension, and Insurance of the House Committee on Veterans' Affairs, 99th

Also at these BVA oversight hearings, the American Legion testified that

> As an important part of our involvement with the issue of veterans suffering from post-traumatic stress disorder (PTSD), we have given special attention to reviewing the decisions of the Board of Veterans Appeals involving claims for service connection or an increased rating for PTSD. There have emerged from this on-going review several problems which have been brought to the attention of the Chairman of the Board of Appeals and

Cong., 1st Sess. 10-11 (1985) (hereinafter "1985 House Hearings").

other VA officials without satisfactory resolution.

In our judgment **too many valid claims are being denied** by the regional offices, and the denials are subsequently confirmed by the Board of Veterans Appeals.[3]

VVA has observed this problem as well."

{EMPHASIS ADDED}

[3] Id. at 40 (Statement of Philip R. Wilkerson, Assistant Director for Claims, National Veterans Affairs and Rehabilitation Commission, The American Legion).

EXCERPT FROM VA MEMORANDUM DATED JUNE 1, 1987, FROM THE CHIEF MEMBER, BOARD OF VETERANS APPEALS, TO THE VA DEPUTY ADMINISTRATOR, SUBJECT: "GRIEVANCE: INTERFERENCE WITH DECISIONAL INDEPENDENCE OF BOARD MEMBERS". SAID EXCERPT APPEARS AT PAGE 10 OF EXHIBIT "N", ATTATCHED TO STATEMENT PRESENTED BY RICHARD E. O'DELL, VICE PRESIDENT AND CHAIRMAN OF COMMITTEE ON ADVOCACY, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, BEFORE THE HOUSE OF REPRESENTATIVES, HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS. HEARING BOOK PAGE 180.

{***** VVA Exhibit "N", page 10} "4. Reversing Majority Decisions: On various

occasions, where the majority of the Board Members, either on an original or an expanded panel have voted to deny a claim, and there has been a request for an administrative allowance, the Chairman has allowed the claims. (See 38 U.S.C. 210(b) and 212(a); 38 C.F.R. 19.184) (See also {a portion of this sentence redacted}. Heretofore, the Chairman had intervened to allow only when the majority had requested an administrative allowance or where there was an expanded panel with an even split. This obviously represents an activist approach and is in derogation of the judicial independence of the Board Members.

5. Failing to assign expanded panels in an impartial manner: On a number of occasions, including a staff meeting on November 3, 1986, the Chairman admitted

that on various occasions, either where there has been a dissent or a request for a reconsideration, he has assigned another section on the basis of his expectation of what the outcome will be. This amounts to **"shopping for judges"** and has the effect of undermining the integrity of the Board.{***** Remainder of letter omitted}

{EMPHASIS ADDED}

(2)

FILED
AUG 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IRWIN COOPER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, THE DEPARTMENT OF VETERANS AFFAIRS and EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY VETERANS DUE PROCESS, INC., ACCOMPANIED BY THE WRITTEN CONSENT OF ALL PARTIES, FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER; AND BRIEF, SUBMITTED PRIOR TO CONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI.

Philip E. Cushman
President,
Veterans Due Process, Inc.
P.O. Box 68237
Portland, Oregon 97268
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INTEREST OF AMICUS

Both parties have consented to the filing of this amicus brief by Veterans Due Process, Inc. ("VDP") in support of petitioner.

VDP is a recognized **"national leader"**[1] in the field of veterans rights, and is dedicated to the implementation of our American ideal of equal justice under law and in advancing the "Rule of Law" for veterans, concerning their dealings with the VA. VDP is an Oregon based Non-Profit Veterans Rights Corporation, organized, in part, for the following purposes, as quoted from the 1982 Articles of Incorporation:

1. To utilize all reasonable means of communication to inform the American people concerning the limitation of

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1 See: The Stars and Stripes, June 25, 1986, front page article.

the rights of veterans under present law in their dealings with the Veterans Administration, including but not limited to the unavailability of judicial review of agency decisions {see: 38 U.S.C. § 211(a) "no review" clause which crept into the law as a provision of the "Economy Act" of 1933}, and the effective denial of the rights to legal counsel by a limitation on attorney's fees in the sum of $10 in connection with proceedings before the Veterans Administration {see: 38 U.S.C. § 3404, 3405, as enacted into law during 1862, originally for $5}.

2. **To take whatever action as is reasonably and legally possible to terminate the denial of rights to veterans in their dealings with the Veterans Administration, which rights are available in**

dealing with other agencies of the United States Government.

Since 1983, VDP has been active on national, state and local levels, in examining the problem of lack of Due Process of Law for America's veterans and their families, and resultant VA abuses, which is, in part, the issue involved in this action. VDP has appeared before numerous Committees of the United States Senate and the United States House of Representatives, concerning various legislative proposals seeking to restore Constitutionally guaranteed "DUE PROCESS OF LAW" legal protections, to American citizens who have been injured defending the United States Constitution i.e. veterans. VDP has participated in national media activities i.e. CNN, ABC 20-20, CBS Investigations, etc.

Recently, VDP was instrumental in causing Congressional passage of the Veterans' Judicial Review Act, Pub. L. 100-687, November 18, 1988, (the "new law"), which Respondents agree **does not apply** to the case of Petitioner Irwin Cooper {nor to approximately 85% of other veterans}. In order to cause the passage of said new law, VDP continuously revealed the "TRUTH" to the Congress, media, and the American people, concerning the illegal and improper practices and operating procedures utilized by the VA for decades, and at issue in Petitioner's case.

VDP believes that it can offer some objective perspectives on the matter at issue, because VDP is one of the only unrestrained, **objective** advocates of veterans rights, by reason of the fact that unlike many of the major national

veterans organizations i.e. American Legion, Disabled American Veterans, Veterans of Foreign Wars, etc., VDP does not receive free office space, free telephone service, free office equipment, etc., from the VA pursuant to 38 U.S.C. §3402(a)(2). VDP has thus avoided the inherent "conflict of interest" which receipt of said federal "perks", invariably create for a veterans rights organization.

VDP is interested in this case because it is vitally concerned with the protection of the rights of veterans, the integrity of the VA administrative process, the observance of lawful procedures by the VA, and our belief in the role of the courts in seeing that the VA act within the bounds of law. The Petitioner's case provides a prime example of decades of VA "Due Process of law"

violations, which evidence that the VA denial of his claim, for decades, was not the considered judgment of an agency faithfully executing the laws of the United States, but rather the operation of a VA covert, clandestine, sub rosa, arbitrary and secret budgetary driven (not law, regulation or fact driven) quota system policy wherein the observance of procedural safeguards was an illusion i.e. the negation of a system.

SUMMARY OF ARGUMENT

Since its creation by Congress during 1930, the United States Veterans Administration has been a creature of "Economy", a concept often proven to be rationally at odds with the purposes of Veterans' benefits legislation.

The "no review" statute (38 U.S.C.§ 211(a)) which the Courts below erroneously concluded Petitioner was attempting to circumvent, by "casting his complaint as a constitutional claim", was a provision of the so-called "Economy Act" of 1933, a law passed during the Great Depression, a part of which was designed to give the VA absolute control and unrestricted discretion in the distribution of veterans benefits, and also unrestricted power in the administration of its programs. President Roosevelt had proclaimed a

"NATIONAL ECONOMIC EMERGENCY", which, in large part, caused the passage of the "Economy Act".

The "New Deal" philosophy of that era was abruptly rejected by the Supreme Court when it held the NRA unconstitutional in Schechter Poultry[2], wherein Justice Hughes declared:

> " . . . extraordinary conditions {the national economic emergency} do not create or enlarge constitutional power" and "is is enough to say that the **recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution**."

Unfortunately for the Petitioner, the very same national economic emergency which

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2 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)

created the "Economy Act" and created the VA "no review" statute, was left intact regardless of Schechter, and continues to victimize veterans, including Petitioner, to this day. The VA no-review provision of the Veterans' Benefits Act (now 38 U.S.C. §211(a), survives as a monument to the discredited economic philosophy of that era.

It is a matter of Congressional Record[3] that the VA, dedicated to President Roosevelt's goad of "ECONOMY", attempted to reduce the service-connected disability compensation then going to World War 1 veterans, by more than 70%. VA hospital and medical services were to be cut by 80%. That same "Economy" mentality, ultimately gave birth to the VA covert

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3 Congressional Record, House,- June 15, 1933, page 6175, Representative Lundeen.

budgetary driven (as opposed to law, regulation and fact driven) quota system.

The Courts below, in dismissing Petitioner's allegations of **SERIOUS VIOLATIONS OF THE UNITED STATES CONSTITUTION by** the VA i.e. employing a covert budgetary driven "quota system" which arbitrarily limits the number of benefits claims granted, and caused Petitioner's VA claims to be denied for decades, ignored his constitutionally guaranteed right **"TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES"**[4], and also ignored his constitutionally guaranteed right to **"DUE PROCESS OF LAW"**[5].

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4 Constitution of the United States, Amendment 1.

5 Constitution of the United States, Amendment 5.

The Courts below also were in error in determining that Petitioner's complaint failed to state **ANY** valid claim for relief on **ANY**[6] **POSSIBLE** legal theory (Rule 12(b)(6), and in so doing, also ignored the time honored maxim of common law that **for every legal wrong there is a remedy.**[7]

The Courts below failed to recognize that one of the basic reasons why a motion to dismiss should be viewed with disfavor by federal courts, especially in a case wherein allegations of serious constitutional violations (budgetery

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6 See: Federal Practice and Procedure, Wright & Miller, West Publishing Co., Volume 5A, 1990, concerning Federal Rules of Civil Procedure Rule 12(b)(6), §1357 at 337.

7 Marbury v. Madison, 1 U.S. 368 at 378, 1 Cranch 137 (1803). The Court stated: **"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."**

driven quota system) exist, is because of the basic precept that the primary objective of the law is to obtain a determination of the merits of any claim; and that **a case should be tried on the proofs** rather than the pleadings.

The Courts below also failed to recognize that in the written **CONTRACT** relationship (Petitioner was not drafted) which Petitioner had with Respondent United States of America, that the failure of said Respondent to warn Petitioner concerning the factors which ultimately gave rise to this action, also give rise to a "quasi-contract" remedy[8].

The Courts below also failed to construe Petitioner's liberally as

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8 See: Corbin on Contracts, vol 1, 1990 Pocket Part, §§19 and 19A, concerning "Quasi-Contract", at 58, etc.

required by Rule 8, but instead construed it by the stricter "traditionally disfavored[9]" standard, because it attacked the constitutionality of the VA system.

The Courts below ignored the provision of the United States Constitution which provides that: **"THIS CONSTITUTION, AND THE LAWS OF THE UNITED STATES WHICH SHALL BE MADE IN PURSUANCE THEREOF . . . SHALL BE THE SUPREME LAW OF THE LAND;**[10] on the basis of which, Chief Justice John Marshall reasoned in Marbury v. Madison[11] that the Constitution is law, that it is the duty of courts to interpret the law in

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9 See: Federal Practice and Procedure, Wright & Miller, West Publishing Co., Volume 5A, 1990, concerning Federal Rules of Civil Procedure Rule 12(b)(6), §1357, at 359.

10 Constitution of the United States, Article 6, Section 2.

11 Marbury v. Madison, 1 U.S. 368, 1 Cranch 137 (1803).

order to decide cases in accordance with it, and that therefore the Supreme Court had the authority and indeed was duty-bound to interpret the Constitution, and to prefer it to any other law {including Respondents cited legal authority in the instant action}.

Justice Marshall pointed out that the Constitution enjoins the courts to enforce as the supreme law of the land only those acts of Congress that are "in pursuance of the Constitution". Therefore, **the Court must first determine whether a law is in pursuance of the Constitution before it is entitled to enforce it as "law of the land."**

The Petitioner has alleged egregious violations of his constitutional right to "due process of law", but Respondents have cited an abundance of "law", Federal

Rules, and other "authority" which they would have the Court believe, supercede Petitioner's rights guaranteed to him by the United States Constitution.

Petitioner properly disagrees with all of Respondents cited "authority", which allegedly legalizes the serious constitutional violations i.e. the covert, sub-rosa VA budgetary driven quota system, employed by the VA for decades, to deny Petitioner's claim for VA benefits.

Contrary to Respondents belief, **THE UNITED STATES CONSTITUTION IS NOT VOID WHERE PROHIBITED BY LAW** i.e federal statutes or case law authority; nor is the VA above the law i.e. the United States Constitution.

The Courts below ignored the fact that the VA system is in violation of our

American system of "Separation of Powers", the central feature of which is the constitutional and political independence caused by the distribution of national powers among the legislative, executive and judicial branches. In 1788, founding father James Madison said:

> "No political truth is certainly of greater intrinsic value or is stamped with the authority of more **enlightened patrons of liberty** than that on which the objection is founded. **The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.**"[12]

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12 James Madison, Federalist, No. 47, 323-31, January 30, 1788.

Accordingly, the founding fathers took special precautions to isolate the judiciary from executive and legislative influence, in part because they were afraid that there might be times when Congress and the President {the "Economy Act"} might respond to political and social convulsions and act hastily and oppressively.

Petitioner Irwin Cooper's complaint, the proof of which is in his possession, establishes that the founding fathers fears were well founded. The VA "system" is the embodiment of what James Madison, and other Founders, feared, because it exercises legislative, executive and judicial functions, all combined into what has come to be known as the "odious 4th branch of government" i.e. ADMINISTRATIVE, which is a totally alien concept to the "separation of powers" principle which the

Petitioner defended during World War II. The Petitioner is entitled to relief by the judicial branch, under the standards of the American system of justice he defended.

On point concerning Petitioner's allegations of serious violations of the United States Constitution by Respondent VA, are the words of Thomas Jefferson, one of the Framers, when he said:

> " . . . it would be a dangerous delusion were a **confidence** in the men of our choice to silence our fears for **the safety of our rights**: that confidence is everywhere the parent of despotism--free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, **to bind down those whom we are**

> **obliged to trust with power**: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go . . . **In questions of power**, then, let no more be heard of confidence in man {to include VA bureaucrats}, but **bind him down from mischief by the CHAINS of the Constitution."**[13]

It is a well know fact to VDP and other objective veterans rights organizations not financially subsidized by the VA, that more than 60 years ago, Respondent VA slipped out of its "chains of the Constitution", and was no longer bound down from mischief. Petitioner Irwin Cooper is a victim of the "mischief" of

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13 Quoted in Alpheus T. Mason, **The Supreme Court: Palladium of Freedom** (Univ. of Michigan Press, 1962), p. 10.

that constitutionally unchecked power. A perfidious betrayal of Irwin Cooper's patriotism and sacrifice for America.

Years ago, Supreme Court Justice Story, was concerned about an attack on the integrity of the United States Constitution, and the rights and liberties of the American people. He envisioned such an attack as possibly being caused by "TEMPORARY PASSIONS AND INTERESTS OF THE DAY" and/or "TO GRATIFY THE AMBITION OF POLITICAL LEADERS". In regard to that concern, he said:

> "Where is controversy to end, if we desert both the letter and the spirit? What is to become of constitutions of government, if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions, **to suit the temporary passions and interests of the**

> **day**? Let us never forget, that our constitutions of government are solemn instruments, addressed to the common sense of the people and **designed to fix, and perpetuate their rights and their liberties. They are not to be violated to gratify the ambition of political leaders**. They are to speak in the same voice now, and forever. They are no man's private interpretation. They are ordained by the will of the people; and can be changed only by the sovereign command of the people."[14]

The attack on the United States Constitution which concerned Justice Story, became a reality, and the present "legal" circumstance of Petitioner is the result.

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14 Commentaries, III, 754.

The Petitioner in this case is guilty only of honorable and patriotic military service to the United States of America. He is a victim of intense VA pressure to reduce expenditures, which decades ago caused the VA to adopt the covert budgetary driven quota system {PROCESS?}, on the basis of which his VA claim was denied, which arbitrarily denied him "due process of law".

Said "Quota System" has permitted the VA Administrator to reap a windfall economic benefit from the adoption of unlawful policies which were kept secret for decades, thus depriving the Petitioner (and thousands of our nation's defenders) the benefits to which they were and/or are entitled by law.

VDP urges the United States Supreme Court to at long last ignore the "ambition

of political leaders" and the "temporary passions and interests of the day", and place the Petitioner on the same legal footing as his fellow American Citizens, and permit him to prove that the Respondents did, in fact, seriously violate his constitutionally guaranteed rights. America's injured defenders should never have been stripped of the basic legal protections which they fought to preserve for every other American. Is nothing sacred?

ARGUMENT

I. THE COURTS BELOW FAILED IN THEIR DUTY TO EXAMINE PETITIONER'S ALLEGATIONS OF SERIOUS CONSTITUTIONAL VIOLATIONS, IN ORDER TO DETERMINE IF THE ALLEGATIONS PROVIDED FOR RELIEF ON **ANY POSSIBLE THEORY.**

The Courts below were under a duty to examine petitioner's allegations of serious constitutional violations, in order to determine if the allegations provided for relief on **ANY possible theory**, not only **the** legal theory on which the petitioner intended to proceed.

The Courts below, aware that a motion to dismiss for failure to state a claim (Rule 12(b)(6), is viewed with

disfavor and is rarely granted[15], and also aware of the basic precept that the primary objective of the law is to obtain a determination of the merits of any claim; and that **a case should be tried on the proofs[16] rather than the pleadings**, had a duty to construe Petitioner's complaint under the Rule 8 **liberal standard** which provides that a complaint need only set out **a generalized statement of facts** from which defendant will be able to frame a responsive pleading.

The petitioner's allegations that the VA violated the First and Fifth

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15 See: Federal Practice and Procedure, Wright & Miller, West Publishing Co., Volume 5A, 1990, concerning Federal Rules of Civil Procedure Rule 12(b)(6), §1357 at 321.

16 See: Federal Practice and Procedure, Wright & Miller, West Publishing Co., Volume 5A, 1990, concerning Federal Rules of Civil Procedure Rule 12(b)(6), §1357, at 325.

Amendments of the United States Constitution in his VA case, by employing a **covert, clandestine, sub rosa, secret** {so far as Petitioner and other veterans are concerned} **budgetary driven** {not law, regulation, or fact driven} **quota system**, in processing claims (the mere "**appearance**" of a legitimate process), which arbitrarily limits the number of VA benefits claims granted, and caused petitioner's VA claim for benefits to be wrongfully and illegally and unconstitutionally denied for decades, etc., is certainly of sufficient strength to survive a motion to dismiss for failure to state a claim, and does provide a basis under **ANY POSSIBLE** legal theory, for relief.

In Bell v. Hood[17], the Court said:

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17 Bell v. Hood, 327 U.S. 678 (1946)

"But as we have already pointed out, **the alleged violations of the Constitution here, are not immaterial, but form rather the sole basis of the relief sought.** Nor can we say that the cause of action alleged is so patently without merit as to justify even under the qualifications noted, the courts dismissal for want of jurisdiction. The Circuit Court of Appeals correctly stated that **the complaint states strong cases and if the allegations have any foundation in truth, the plaintiffs legal rights have been ruthlessly violated.**"

ARGUMENT

II. THE COURTS BELOW FAILED IN THEIR DUTY TO CONSTRUE

PETITIONER'S COMPLAINT BY THE RULE 8 LIBERAL STANDARD, BUT INSTEAD APPLIED A STRICTER STANDARD BASIS BECAUSE PETITIONER'S COMPLAINT AGAINST THE VETERANS ADMINISTRATION ("VA") SYSTEM, PRESENTED A **TRADITIONALLY DISFAVORED** "CAUSE OF ACTION"

The Courts below should have applied the usual liberal Rule 8 standard for construing petitioner's complaint, and assumed, for purposes of the motion to dismiss, that the petitioner's allegation that VA determinations of ineligibility in his VA case, were not the considered judgment of a Federal agency faithfully executing the laws of the United States, but that said VA determinations were the direct result of the alleged covert, clandestine, sub rosa and secret budgetary

driven VA "quota system", which simply ignored applicable VA laws, regulations, and the facts in petitioner's case, and thus violated Petitioner's constitutionally guaranteed right to due process of law. On that basis, the Courts below should have permitted the case to go forward, and be tried on the **proofs** rather than the pleadings

The extent to which cases concerning VA lawlessness (such as at issue in the instant action) are regarded by the Judicial Branch as being "DISFAVORED", is indicated by the fact that many cases such as Petitioner's, nationally, go routinely unreported. Many are stamped by the Courts: "will not be published in the federal reporter" or are marked "not appropriate for publication" and "may not be cited to or by the courts". Many such cases are sealed. Perhpas the most

significant indicator of the extent to which veterans cases against the VA are "disfavored" by the Judicial Branch, is the fact that, upon information in belief (and a LEXIS search of the national federal data base), approximately 120,000 such cases have dismissed from Federal Courts, since the VA judicial review preclusion statute was enacted into law as a result of the 1933 "Economy Act."

ARGUMENT

III. THE COURTS BELOW CONCLUDED, IN ERROR, THAT PETITIONER WAS ATTEMPTING TO CIRCUMVENT THE VA JUDICIAL REVIEW PRECLUSION (38 U.S.C. § 211(a)) **BY CASTING/CLOAKING HIS COMPLAINT AS A "CONSTITUTIONAL CLAIM**

ARISING OUT OF THE DENIAL OF BENEFITS".

Respondents assertion that Petitioner's allegations of serious constitutional violations, as being cloaked as such to avoid the VA judicial review preclusion statute, is a specious argument, which simply constitutes an attempt by Respondents to avoid the exposure and possible national scandal from a trial which which Respondents know (from a portion of Petitioner's proof already of record in this case) would likely result.

Such a specious argument has the potential of providing a means by which Respondents can, as in the case of the petitioner, easily violate the constitutional rights of any of its citizens by simply alleging, when confronted with **ANY** allegations of

serious constitutional violation(s), that said allegations are only "cast in the guise" of a constitutional claim, and on said basis, avoid the "proof" at trial, and simply obtain dismissal on "technical grounds".

There exists a terrible danger, that such an ruse could ultimately serve as a means to deny a forum to any and/or all American citizen **in which to pursue a claim that the United States Government seriously violated the Constitution**. Thus, **the most lawless acts of our government, in direct violation of the United States Constitution, could be immune from judicial proceedings and effective accountability**, creating a gross departure from our **government of laws** envisioned by the founding fathers.

The Courts below asked Petitioner to identify the VA due process violations acts in connection with the VA claim denial, in order for the Court to determine if said denials were of a constitutional nature as opposed to merely being poor procedure. Petitioner alleged to the Court that the VA does not follow its own laws, regulations, or apparent operating procedures, because the VA arbitrarily makes benefits decisions on the basis of a budgetary driven "quota system", which ignores the laws, regulations, facts and apparent operating procedures. The Court should have recognized that such a VA practice is not just "poor practice", but the arbitrary negation of the Veterans Benefits Act, VA Statutes, regulations, etc. In Bowen v City of New York[18], the Court found that

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18 Bowen v. City of New York, 476 U.S. 467 (1986).

the Social Security Administration's ("SSA") improper practice was "covert", "clandestine", "sub rosa", and "secret" so far as the claimants were concerned; this "covert policy" was followed consistently . . . that the disability benefit system was turned into "an adversarial trap in which the intended beneficiaries become the victims", and that the SSA claimants incorrectly believed "that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States". The Petitioner can prove that that the problems which gave rise to Bowen, were not as egregious as the result of the VA's covert budgetary driven quota system, which caused Petitioners VA claims to be denied for decades.

Finally, the covert VA "quota systems" goal of saving money is not

rationally related to the purposes of veterans' benefits legislation.

ARGUMENT

IV. IN THE ABSENSE OF ANY SPECIFIC WARNING TO PETITIONER TO THE CONTRARY DURING THE CREATION OF PETITIONER'S WRITTEN CONTRACT WITH RESPONDENT UNITED STATES OF AMERICA, SAID RESPONDENT SHOULD HAVE BEEN ESTOPPED FROM ASSERTING THE VA JUDICIAL REVIEW PRECLUSION STATUTE (38 U.S.C. § 211(A)) AS A DEFENSE. THE PETITIONER HAD A RIGHT TO KNOW, AND RESPONDENT, IN FULL POSSESSION OF THE FACTS DURING THE CONTRACT PROCESS, HAD AN AFFIRMATIVE DUTY TO WARN.

During World War II, petitioner entered into a formal written **CONTRACT** (not drafted) with Respondent United States of America, wherein he contracted to serve in the military service. Both parties to said contract were under an obligation of "good faith".

Requisite to said contract process, Petitioner was required to divulge all essential information required by the Respondent United States of America, in order for it to make an informed decision, as to whether or not he would be inducted.

Petitioner (and society in general) reasonably expected, and therefore assumed without question, that if he were injured while serving the United States of America, that he would receive, and have a **legal enforceable right** to, medical

care and/or disability compensation from the United States of America, for as long as necessary.

During said contract process, the petitioner had a right to know, and the Respondent United States of America, in full possession of the facts concerning the severe limitations which Respondents would impose on Petitioner's legal rights, were he to enter into said contract and ultimately become a veteran, failed in its affirmative **duty to warn** him that if he were injured while patriotically fulfilling his part of said contract, that contrary to his reasonable expectations, and the reasonable expectations of society in general, he would not have a **legal enforceable right** against Respondent United States of America, to compel it to provide necessary medical care, disability compensation, etc., concerning any

injuries which Petitioner might suffer fulfilling said contract.

Respondents also failed to warn Petitioner that he would **not**, as he reasonably expected, have a right to full "due process of law" legal protections guaranteed to every American citizen by the united states constitution i.e. full access to the American system of justice (access to the courts and the right to counsel), in order to enforce whatever such veterans benefits to which he ultimately could become entitled.

In the absence of any specific warning to Petitioner to the contrary, Respondents should have been estopped from asserting the VA judicial review preclusion statute (38 U.S.C. § 211(a) as a defense, nor should Petitioner's complaint have been disposed of on

"technical grounds" because it was construed under the stricter standard (as opposed to the Rule 8 liberal standard) of a "traditionally disfavored cause of action, created by the judicial review preclusion. Again, Petitioner had a right to know about the "judicial review" preclusion statute, when entering into his contract with Respondent United States of America, but said Respondent ignored its **DUTY TO WARN**.

Petitioner also reasonably expected that he would would have a legal enforceable right to the full protections of the United States Constitution i.e. full access to the American system of justice (access to the courts and the right to counsel), in order to enforce whatever veterans rights to which he ultimately could become entitled, as a result of his military service.

The United States Constitution and the demands of EQUITY and JUSTICE demand that Judicial relief be accorded the Petitioner.

ARGUMENT

V. THE COURTS BELOW FAILED TO CONSIDER A LAW IMPOSED **"QUASI-CONTRACT" REMEDY** IN THIS CASE, IN ORDER TO REACH A RESULT CONSISTENT WITH EQUITY AND JUSTICE.

The courts below failed to consider a law imposed **"quasi-contract" remedy** in this case, arising out of the failure of Respondent United States of America to warn/disclose to Petitioner during the creation of the written contract, that he would not, contrary to his reasonable

expectations (and that of society in general), have a legal **enforceable** {access to the Courts, right to counsel, protections of the Administrative Procedures Act ("APA"), etc} right to VA medical care, disability compensation, etc., concerning any injuries which he might suffer fulfilling his part of the contract.

Respondents violated its duty of "good faith" concerning its contract with Petitioner, causing the Petitioner unjust detriment, and creating an unjust state of affairs in this case. Said "state of affairs" demands that a result consistent with justice be reached, fully consistent with the reasonable expectations of petitioner and society.

Contrary to the reasonable expectations of both Petitioner and

society, concerning his formal written contract with Respondent United States of America, he was unjustly confronted with a VA system which not only seriously violated his constitutional rights i.e. employed a covert, clandestine, sub rosa and secret budgetary driven quota system policy in "processing" and denying his claim, which arbitrarily denied him due process of law, but in the process, subjected him, ironically, to a "system of justice" which was (and is) totally alien to the American system of justice which he served to protect.

Said acts on the part of Respondents created the very kind of injustice contemplated by a **"quasi-contract" remedy**. Respondents had a duty implied in law arising out of its contract with petitioner, and the unjust detriment to the petitioner, and unjust state of

affairs in this case, demands a judicial result consistent with equity and justice be reached in this case,

The Courts below should have determined that justice requires a "quasi-contract" remedy.

CONCLUSION

For the reasons stated in this brief and in the Petition for Writ of Certiorari, the writ should be granted, and the petitioner should be returned to the Southern District Court of New York, under another judge, to establish the validity of his allegations of serious constitutional violations by the VA.

Respectfully submitted,

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